149 U.S. 79

# RECORD, CASE No. 13,797.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1892.**

TERM No., 202.

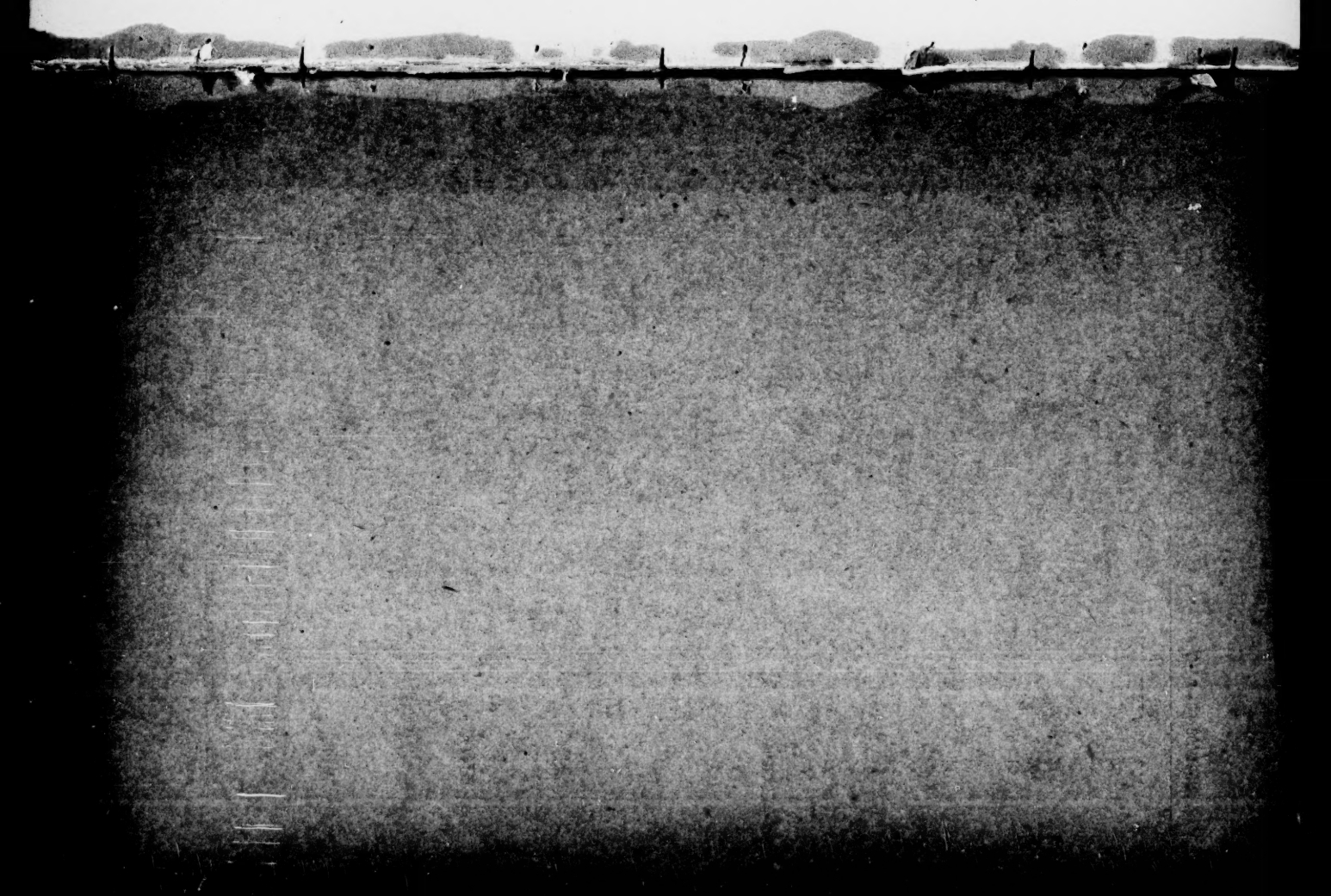
JOSEPH H. CHANDLER, PLAINTIFF IN ERROR,

*vs.*

THE CALUMET AND HECLA MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

**FILED OCTOBER 17, 1889.**



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1 United States Circuit Court, Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY.

*Narr.*

I hereby acknowledge myself security for all such costs as shall be awarded to the defendant in this cause.
Dated Dec. 29th, 1887.

DAN. H. BALL.

Filed Dec. 29th, 1887.

F. M. MOORE, *Dep. Clerk.*

BALL & HANSCOM,
*Att'y- for Plaintiff.*
ISAAC MARSTON, *Of Counsel.*

2 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Northern Division of the Western District of Michigan, of the May Term, A. D. 1888.

NORTHERN DIVISION OF THE WESTERN DISTRICT OF MICHIGAN, *ss:*

Joseph H. Chandler, of Chicago, Cook county, Illinois, who is a citizen of the State of Illinois, by Ball and Hanscom, his attorneys, comes and files this declaration as commencement of suit, and complains of The Calumet & Hecla Mining Company, a corporation created by and under the laws of the State of Michigan, and whose principal place of business and residence is at Calumet, Houghton county, in said northern division of said western district of Michigan, defendant in this suit, for that whereas the said plaintiff, on the 8th day of November, A. D. 1887, was possessed of the following real estate and premises, situate in the county of Houghton and said northern division of the western district of Michigan and being known and described as the southeast quarter of the northwest quarter of section twenty-three (23), in township fifty-six (56) north, of range thirty-three (33) west, — the value of ten thousand dollars and upwards, which said premises the said plaintiff claims in fee simple; and he, said plaintiff, being so possessed thereof, the said defendant afterwards, to wit, on the 9th day of November, in the said last-mentioned year, entered into said premises and ejected the said plaintiff therefrom and unlawfully withholds from said plaintiff the possession thereof, to the damage of said plaintiff ten thousand dollars, and therefore he brings his suit, &c.

BALL & HANSCOM,
*Attorneys for Plaintiff.*

ISAAC MARSTON, *Of Counsel.*

3 United States Circuit Court for the Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY.

On filing declaration on this cause as commencement of suit, according to the statutes in such case — and provided, and on motion of Ball & Hanscom, att'ys for the plaintiff, ordered that the defendant appear and plead to said declaration within twenty days after service on it — a copy thereof and motion of this rule or judgment, &c.

BALL & HANSCOM,
*Att'ys for Plaintiff.*

Dated and entered December 29th, 1887.

F. M. MOORE, *Dep. Clerk.*

4 *Plea of Notice.*

STATE OF MICHIGAN:

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER, Plaintiff,
*vs.*
THE CALUMET & HECLA MINING COMPANY, Defendant.

And now comes the said defendant, by T. L. Chadbourne, its attorney, and demands a trial of the matters set forth in the said plaintiff's declaration.

Dated January 27th, 1888.

T. L. CHADBOURNE,
*Attorney for Defendant.*
ASHLEY POND, *Of Counsel.*

GENTLEMEN: Please to take notice that under the general issue above pleaded the defendant in this cause will aver and insist in its defence that this action was not brought or commenced within twenty (20) years after the right to bring the same first accrued (if it ever accrued) to the State of Michigan, from which State the plaintiff herein claims as its grantee of the lands in his declaration described, and was not brought or commenced within twenty (20) years after the right or title of the people of the State of Michigan in and to the premises mentioned in plaintiff's declaration first accrued, and that plaintiff's action is barred and discharged by virtue of the premises.

Yours, etc.,

T. L. CHADBOURNE,
*Attorney for Def't.*
ASHLEY POND, *Of Counsel.*

Dated January 27th, 1888.

To Messrs. Ball & Hanscom, plaintiff's attorneys.

5 *Journal Entry.*

At an adjourned session of the circuit court of the United States for the 6th circuit and western district of Michigan, northern division, continued and held at the circuit court rooms, at the city of Marquette, in said district and division, on Friday, the third day of August, A. D. 1888, and of the Independence of the United States the one hundred — thirteenth.

Present: Honorable — F. Severens, dist. judge.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY. } Ejectment.

This cause having been duly noticed for trial by the defendant for the present May term of this court and having been duly placed on the calendar for trial at the beginning of this term, and it appearing to the court now here that the parties hereto thereafter but heretofore entered into a written stipulation providing, among other things, that this cause should be tried at the May term of this court: Provided, further, the same should be adjourned to a day in July not later than the 10th or to a date after August 20th; and the May term of this court having been in fact continued and adjourned to July 31, 1888, and said stipulation providing that the defendant herein might at its option in such case try the cause at the city of Grand Rapids at such time as should suit its convenience, after June 1st and before July 10th, on giving ten days' notice of trial to plaintiff; and said stipulation further providing that the judgment given herein by the judge or judges at Grand Rapids should be thereafter duly entered in this court; and this cause having been heretofore duly noticed for trial at Grand Rapids, pursuant to said stipulation, for the 3rd day of July, 1888, at ten o'clock a. m., and

6 the said defendant being then and there in court, to wit, in the city of Grand Rapids, on the 3rd day of July, 1888, at ten o'clock a. m., in the United States court-room in said city, before the circuit court of the United States for the western district of Michigan, southern division, in session, by T. L. Chadbourne, its attorney, and Ashley Pond, its counsel, the said plaintiff, having been then and there solemnly demanded, came not, but therein made default, whereupon it was considered and adjudged then and there, and is now considered and adjudged, that the said plaintiff take nothing by his suit, and that the defendant do go thereof without day, and that the defendant recover against the plaintiff its costs and charges by it about its defence in this behalf expended, to be taxed, and that the defendant have execution for said costs when taxed.

7 *Stipulation. Filed June 28th*, 1888. *F. M. Moore, Dep. Clerk.*

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER
*vs.*
CALUMET & HECAL MINING COMPANY.

It is hereby agreed between the parties to this cause as follows:

1st. That if the term of said court appointed to be holden in May, 1888, be adjourned or continued to a day in July not later than the 10th or to a date after August 20th this cause shall be tried at such adjourned term, and that in such case or in case of its trial in Grand Rapids, as hereinafter mentioned, the same shall be tried by the court without a jury.

2nd. That should there not be such an adjourned term, then the case shall be tried at the regular September term of said court without notice of trial.

3rd. That the defendant may, at its option, try the cause at the city of Grand Rapids at such time as shall suit its convenience, after June 1st and before July 10th or after August 20th; but in such case ten days' notice of the time of trial shall be given to the plaintiff, and in case of trial at Grand Rapids the judgment given by the judge or judges thereat shall be thereafter duly entered in the court above named.

8 4th. That either party may examine witnesses in said cause in this State upon giving five days' notice of the time and place thereof and of the names of witnesses to be examined and at any place out of the State upon giving ten days' like notice, and the testimony of witnesses so taken or their depositions may be used in evidence without reference to the distance of their residence from the place of trial, and either party may, if he sees fit, examine such witnesses upon written interrogatories.

ISAAC MARSTON,
*Counsel for Def't.*
T. L. CHATBOURNE,
*Dfe's Att'y.*

9 Dan H. Ball. Irving D. Hanscom.

Law office of Ball & Hanscom, Nester block, Washington street.

MARQUETTE, MICH., *June 19th*, 1888.

T. L. Chadbourne, Esq., Houghton, Michigan.

DEAR SIR: Enclosed find acknowledgment of service of notice of trial in case of Chandler *vs.* Calumet & Hecla Mining Co. I shall be at Houghton Thursday evening to go with you to Calumet the following morning pursuant to the notice heretofore served on us. Mr. Ball is at Duluth and will probably be gone ten days.

Respectfully yours, IRVING D. HANSCOM.

1 enclosure.

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY. } Ejectment.

GENTLEMEN: Under the terms of the stipulation in writing between the parties hereto, by Isaac Marston for the plaintiff and myself for the defendant, notice is hereby given you that this cause will be tried at the city of Grand Rapids, Michigan, on Tuesday, July 3rd next, at the United States court-room in that city, at the opening of the southern division of the above-named court or as soon thereafter as counsel can be heard, and should said last-named court not then be in session, then at ten o'clock a. *d.* of the last-named day at the same place, before the Honorable H. F. Severens, judge thereof, sitting alone or with another Federal judge or judges.

Dated June 18th, 1888.

Yours, etc., T. L. CHADBOURNE,
*Def't's Att'y.*

To Ball & Hanscom, pl'ff't's att'ys.

A duplicate of the above notice was duly served on us June 18th, 1888.

BALL & HANSCOM,
*Plaintiff's Att'y.*

10 *Motion for New Trial. Filed Aug. 4th,* 1888. *F. M. Moore, Dep. Clerk.*

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY. }

Now comes the said plaintiff, by Ball & Hanscom, his attorneys, and moves the court to set aside the nonsuit heretofore ordered by the honorable judge of this court in this cause and to grant a new trial therein, to be had at some future day, for the reason that said plaintiff was surprised at the course taken by the defendant in demanding a nonsuit instead of bringing the matter for trial before the court upon the stipulation of facts filed therein, and other reasons set forth in the annexed affidavits, or, if it shall not be deemed proper by the court to grant further time for preparation for first trial in said cause, that said cause be considered upon the facts set forth in said stipulation, and that judgement be given therein as upon the trial of the cause.

This motion is founded upon the files of this cause and the affidavits of Isaac Marston and Dan. H. Ball, filed herewith.

BALL AND HANSCOM,
*Attorneys for Plaintiff.*

11 The Circuit Court of the United States for the Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY.

WESTERN DISTRICT OF MICHIGAN, *ss:*

Dan. H. Ball, of the city of Marquette, in said district, being duly sworn, says *say* that he is one — the attorneys for the plaintiff in the above-entitled cause; that prior to the commencement of said action the matter involved in said suit was in hands of Honorable Isaac Marston, as counsel, and deponent was requested by said Marston to file a declaration therein and to appear as attorney in the case, but that the entire management of said cause remained with said Marston.

Deponent was acquainted with the facts upon *n*hich plaintiff's claim depended only in a general way, and was unable to make preparations for trial except as directed by said Marston. A stipulation of facts was entered into between said Marston and the attorney for the defendant and filed with the clerk of this court, as appears by the filing thereon endorsed on the 28th day of June last.

Deponent had correspondence with defendant's attorney about and after the time that this cause was noticed for trial before the judge of this court at Grand Rapids in relation to a continuance thereof, in which he informed said attorney that it was impossible for plaintiff to be ready for trial at the time designated. Deponent also had a conversation with said Marston in regard to the said trial and was told by said Marston that it would be unnecessary for deponent to attend on the trial or make any further preparations therefor, as it would be impossible for him to try the case, and it was understood that unless a continuance could be obtained said cause should go to trial upon said stipulation and depositions already taken, together with such other evidence as the defendant might see fit to offer and submit to the court for final judgement with the view of taking a new trial under the statute if judgment should be against the plaintiff. Deponent relied upon said Marston either to appear or procure some person to appear for him and move for a continuance, or let the case go to judgment upon the understanding aforesaid, and for that reason did not attend at the time set for trial.

12

At about the time set for trial of said cause or since then deponent has had a conversation with plaintiff in this cause, who resides in Chicago, State of Illinois, and was informed by him that he believed Edwin J. Hulbert, who resided at and had charge of the Hecla mine in the early part of 1867, but who, as deponent was in-

formed and believes, has spent the larger part of the several years last past in Europe, was an important and material witness for the plaintiff on the subject of the defense of adverse possession and statute of limitations raised by the defendant, and that by him he could successfully controvert the testimony taken by the defendand on that subject, and that he was desirous of obtaining his testimony, but as yet had been unable to ascertain his whereabouts so as to take his deposition or to learn positively what testimony he could give upon the subject.

DAN. H. BALL.

Subscribed and sworn to before me this 25th day of July, A. D. 1888.

RICHARD BLAKE,
*Notary Public in Aforesaid County.*

13 The Circuit Court of the United States for the Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Isaac Marston, being duly sworn, deposes and says that he is and has been of counsel for plaintiff in the above-entitled cause, and as such has had charge of the plaintiff's case from the commencement thereof; that prior to the commencement of said cause and before the plaintiff obtained his patent for the land described in plaintiff's declaration all the facts pertaining to the title to said lands, both as claimed by defendant and by the State of Michigan, were laid before this deponent and an opinion asked for thereon.

That deponent at that time made a very careful examination of the entire matter and came to the conclusion and so gave his opinion that the said land being, the greater part of it, swamp in fact, and being so indicated upon the maps at Lansing, the same was the property of the State under the act of Congress granting swamp lands, and that the subsequent grant to the canal company and patent by the State of United States lands would not pass the State title.

That deponent then inquired as to what possession, if any, had been taken or had by the defendant, and was assured that there had been no actual, visible possession taken of the land in dispute until within twelve years last past.

14 That upon such investigation and assurance deponent was of opinion and still is that the patent from the said State of Michigan to the said plaintiff conveyed to him a good and valid title to said land.

That upon such patent being issued the plaintiff, not desiring de-

lay but a speedy settlement of the question, directed the present action to be commenced.

That after the commencement thereof deponent suggested to the attorneys of record for the plaintiff and also the attorneys for defendant that as the title to said property was of record and would be voluminous and difficult to produce in court an agreement might well be entered into setting forth the plaintiff's and the defendant's claim of title in full respectively.

That with this object in view and for the purpose of preparing for a trial of said cause upon the merits Mr. T. L. Chadbourne, attorney for defendant, met deponent in the city of Detroit during the latter part of April, 1888, and several interviews were had, resulting in two stipulations being agreed upon and signed, one setting forth the evidence of title of the respective parties and the other agreeing upon a time for the trial of said cause at a date not later than July 10th or until after August 20th, 1888, these dates being agreed upon for the accom-odation of the counsel for the respective parties.

That, as deponent recollects, the only questions of fact left open by these stipulations related to the possession of defendant and when and by whom the letter "S" was placed upon the map of those lands on file at Lansing, indicating the same to be swamp lands.

15 That at the time such stipulations were drafted and signed deponent understood defendant's attorney that he would file the same with said court in said cause; that deponent at the time such stipulations were so agreed upon was in very poor health and left the State within a day or two afterwards and did not return until the 28th or 29th day of May following.

That a copy of such stipulation was sent to Messrs. Ball & Hanscom, attorneys for plaintiff, with a request that they attend to the taking of the oral testimony as to defendant's possession.

That shortly after deponent's return home, as stated, he was informed by said Ball & Hanscom that some witnesses had been examined by defendant showing an actual possession of more than twenty years prior to the commencement of this suit, and this was the first time deponent had any intimation of such extended possession.

That deponent thereupon wrote to the said plaintiff and others, who might, perhaps, have some knowledge of the facts, as to the importance of ascertaining the correctness of such testimony, but owing to the fact that the plaintiff was frequently absent from his place of residence in Chicago and of deponent's absence at times after his said return home there was considerable delay, and deponent was unable to and did not hear from said plaintiff in reference to said matter until after the case had been noticed under said stipulation for hearing on July 3rd. The deponent then had an interview with said plaintiff, but the exact date thereof deponent

16 cannot state, when plaintiff informed deponent that a person whose name deponent does not recollect had just returned from Europe, where he had been, as deponent understood, for some years, and who was entirely familiar with the question of actual possession of said premises, having resided near there for many years,

both prior and subsequent to defendant's acquiring its claim of title thereto, and said plaintiff further said to deponent that he, plaintiff, was informed and believed that he could prove by such person that such defendant had not been in possession the time claimed in the testimony referred to; that he, plaintiff, had written such person as par address given him in reference to this matter, but had received no reply; that plaintiff and deponent agreed that it would be difficult in the then remaining time before July 3rd to find the actual residence of such person and obtain his testimony in time for such trial; that the proper course to pursue under the circumstances would be to ask defendant's attorney to permit the case to go over to the second date fixed in said stipulation, viz., August 20th or afterwards, and if such consent was not given, that as the stipulations as to time of trial and the principal facts as already stated were on file in the cause the case could be supmitted thereon, and if judgment was rendered thereon for the defendant, then plaintiff would have ample time to investigate the disputed questions of fact, take a new trial under the statute, and try the case upon the merits, and except for this purpose said plaintiff does not, to the knowledge and belief of this deponent, and deponent does not desire any delay.

17 Deponent further says that he shortly afterwards wrote to Mr. Chadbourne, defendant's attorney, a copy of which letter is hereto attached, marked "A;" that deponent also about the same date saw Mr. Pond, who is of counsel for defendant, and informed him that deponent would not be able to try the case on the merits on July 3rd and of what he had written Mr. Chadbourne, and, as deponent understood Mr. Pond, he replied that he could not make an agreement that the case would not be taken up; that he, Pond, had no ojection to the case going over the later date, but that he had once before obtained delay, and he would prefer to leave the matter with Chadbourne, and deponend then obtained the impression that there would be no serious objection to the case going over to the latter date; that deponent certainly expected Mr. Chadbourne to reply to his said letter of June 26th if he, said Chadbourne, intended to insist upon going to trial on said July 3rd.

That deponent, owing to ill health, has not been able to give personal attention to business much more than half the time since his said return home, the last days of May.

That he, deponent, left his home in Detroit for the vicinity of Bay City on June 29th, expecting to remain there until about July 20th, when he expected to go North and be absent until about August 20th.

That deponent, before going, requested the clerks in his office, in case a letter was received from Mr. Chadbourne stating that he, said Chadbourne, would insist upon trying the case upon said July 3rd, to wire this deponent, when he, deponent, could proceed to Grand Rapids and be present and then make application in due

18 form for a continuance, and intending, if the same was not granted, then that said court would consider the case upon the stipulation of facts in the case and render such judgment as would be proper thereon; that deponent, not hearing from said

Chadbourne, for the reasons stated, did not go to Grand Rapids on July 3rd.

That since then deponent has been informed that said Chadbourne and Pond did appear, and, as no one appeared for plaintiff, insisted upon a jodgment of nonsuit, which was granted, without their calling the attention of the court to the stipulation of facts agreed upon, and which was or ought to have been in the files in said cause.

And further deponent saith not.

[SEAL.] ISAAC MARSTON.

Sworn to and subscribed before me this 17th day of July, 1888.

ISRAEL T. COWLES,
*Notary Public, Wayne County, Michigan.*

19 "A."

DETROIT, MICH., *June 26th*, 1888.

Thomas L. Chadbourne, Esq., Houghton, Michigan.

DEAR SIR: I received a letter from Meisrs. Ball & Hanscom, informing me that you had noticed the Calumet & Hecla case for trial at Grand Rapids on July 3rd.

It would be impossible for me to be ready for trial at that date, and if you insist upon going on, I shall have to make an application to the court for a continuance. There is certain testimony that I have got track of which I desire to obtain, but cannot in time for the date mentioned. I shall be ready to take it up after my summer vacation, as per stipulation.

I notify you so that you need not put yourself to the trouble of taking a trip down here unless you wish to do so.

Yours resp'y, ISAAC MARSTON.

(Dictated.)

20 *Stipulation of Plaintiff. Filed Aug. 11th*, 1888. *F. M. Moore, Dep. Clerk.*

The Circuit Court of the United States for the North. Division of the Western District of Michigan.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY. } In Ejectment.

In accordance with the order of the court setting aside the nonsuit heretofore entered in this cause and granting a new trial therein on the conditions therein set forth, it is hereby stipulated upon part of the plaintiff that the right to a second new trial as a matter of right under the statutes of the State of Michigan is hereby waived.

Dated Marquette, August 11th, 1888.

BALL & HANSCOM,
*Attorneys for Plaintiff.*

21 *Opinion of the Court. Filed Nov. 16th,* 1888. *F. M. Moore, Dep. Clerk.*

United States Circuit Court for the Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY.

Opinion of the court.

In giving effect to the grant of 1850 it has been held by the Supreme Court of the United States that, in order that the grant should accomplish its purpose rather than fail, where the Secretary of the Interior had taken no action in executing a duty devolved upon him of designating the lands which should be included in the grant, and where after the lapse of a reasonable time for the segregating of the lands in that way nothing had been done in that direction, parol proof might be received for the purpose of showing that the lands were of the character described in the general language of the act. There is some analogy in this to the case of an appointed arbitrator or umpire who refuses or fails to act. Other means are then allowable to determine the matter, because justice should not be withheld, even though the instrumentalities to it more especially in contemplation fail.

That was the consideration which led to the decision of the court in Railroad Co. *vs.* Smith, 9 Wallace, 85.

22 This, however, does not at all impugn the general proposition that the Secretary of the Interior was intended by Congress to act as the agent of the Government in determining the lands in respect of their character upon which the grant should operate, nor the further proposition that where the Secretary has discharged his duty and made the determination throughout a State or a comprehensive locality, and no objection was made by the State to the mode and result of the exercise of that duty, and no proceedings, judicial or otherwise are, resorted to for the purpose of modifying the Secretary's action or extending or renewing the exercise of his powers over other lands, the State cannot assume that other lands not claimed theretofore under the act and never listed or approved under it passed to it by the general language of the act and rest its right to it upon evidence *in pais* in respect to its quality.

Such a course would render nugatory the substantial purpose of appointing the Secretary at all, which manifestly was to identify the lands and thus fix the grant.

It was a matter of great public convenience and importance that this extensive grant of parcels of the Government lands should be identified, and that identification is nothing if after it has taken place the whole matter remains at large.

These are the conclusions which I think result from the course of adjudication in the Supreme Court from the case of Railroad Com-

pany *vs.* Smith, 9 Wallace, 85, to Wright *vs.* Roseberry, 121 U. S., 488.

But upon another ground I am of opinion that the plaintiff cannot prevail.

23 That the swamp-land grant of 1850 conferred upon the States complete dominion over the granted lands and absolute proprietorship therein, so far as third persons are concerned, has been repeatedly held. (The question has been somewhat widely discussed as to whether there was anything in the nature of a trust between the General Government and the State in respect of these lands, but the result of the discussion upon that is as will be stated a little further on.)

The authorities which may be cited in support of this general proposition are the cases known as the Iowa railroad cases.

Emigrant Company *vs.* County of Adams, 100 U. S., 61.

Mills County *vs.* Railroad Companies, 107 U. S., 557, and the case in Louisiana, Hagar *vs.* Reclamation District, 111 U. S., 701, and The United States *vs.* Louisiana, 127 U. S., 182.

It was an absolute gift to the States without any limitation in the nature of a property trust, or anything to prevent the application by the State of the swamp-land fund to general purposes.

The obligation of the State should be commensurate with the proprietory rights accorded to it, and its dealings with such rights tested by principles applicable to a proprietor.

The most that can be claimed on the facts inferred most favorably to the plaintiff is that the State (the State of Michigan in this case) had a right to have this land listed and approved by the Secretary of the Interior and thus designated as part of the grant; but it was a right which was not asserted by the State.

24 If it had been it might have been disputed by the Secretary, and if he had denied it it would never have ripened into title.

At least, this would be so unless some further proceedings should be taken to vindicate and enforce that right.

Instead of insisting upon the right (if it had it) the State selected and received this description under another grant and conveyed it for a valuable consideration to a third person, who took it *bona fide*.

The State could not after this had been done be heard to say that it would repudiate its own course and, dishonoring its patent, claim title under the act of 1850 and resell it to another.

Certainly this could not be done without a judicial proceeding instituted for that purpose. How that might have resulted it is not for me to say, but it is the inclination of my opinion that the result here indicated must be the result, even in such proceeding as that or anywhere where these facts came in controversy.

The result of these views is that the offers of oral evidence would be declined. The oral evidence offered to show that these lands were swamp lands, such as are mentioned in the grant, is, upon what appear to be undisputed facts, rejected, and the court will therefore instruct the jury that upon the facts as they are made to

appear in this case the defendant is entitled to the verdict and they will render it accordingly.

H. F. SEVERENS,
*Dist. Judge.*

25 William H. Wells, Alexis C. Angell, counsellors-at-law, 72 Griswold St.

DETROIT, MICH., *Feb. 5th*, 1889.

Hon. H. F. Severens, district judge.

DEAR SIR: The annexed bill of exceptions in case of Chandler *vs.* The Calumet and Hecla Company is satisfactory.

Yours, et-., ASHLEY POND,
*Of Counsel for Def't.*

Ditto.
ISAAC MARSTON.

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit, Western District of Michigan, Northern Division.

JOSEPH H. CHANDLER, Plaintiff,
*vs.*
THE CALUMET & HECLA MINING COMPANY, Defendant.

At a session of said court held at the court-rooms, in the city of Marquette, in said western district of Michigan and northern division, on the 13th day of November, A. D. 1888, before the Honorable Henry F. Severens, district judge, the issued joined between the parties came on to be tried by a jury of said western district of Michigan and northern division, good and lawful men, for that purpose duly empanneled, tried, and sworn; at which day there came the plaintiff, as well as the said defendant, Messrs. Ball &
26 Hanscom and Isaac Marston appearing for the plaintiff and Thomas L. Chadbourne and Ashley Pond appearing for the defendant; and thereupon the said parties proceeded to the trial of said issue.

And upon the trial thereof the plaintiff's counsel, to maintain and prove the issue upon his part, offered and the same were received and read in evidence the following:

Upon being requested by counsel for the plaintiff the counsel for the defendant admitted that the defendant was in possession of the premises described in plaintiff's declaration at the time of the commencement of this suit and admitted that said land was worth the sum of ten thousand dollars and upwards.

And plaintiff's counsel next read in evidence the following:

GENERAL LAND OFFICE, *November 21st*, 1850.

SIR: By the act of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," approved September 28, 1850, it is directed "that to

enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed land therein the whole of those swamp and overflowed lands made thereby unfit for cultivation which shall remain unsold at the passage of this act shall be, and the same are hereby, granted to said State."

1st. By the 4th section of this act it is directed that the provisions of it shall be extended to and their benefits be conferred upon each of the other States of the Union in which such swamp and overflowed lands may be situated.

2nd. And "that in making out a list and plats of the lands aforesaid all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats;
27 but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom."

This act clearly and unequivocally grants to the several States those lands which from being swampy or subject to overflow are unfit for cultivation. In this class is included also all lands which, though dry part of the year, are subject to inundation at the planting, growing, or harvesting season, so as to destroy the crop, and therefore are unfit for cultivation, taking the average of the seasons for a reasonable number of years as the rule of determination.

You will please make out a list of all the lands thus granted to the State, designating those which have been sold or otherwise disposed of since the passage of the law and the price paid for them when purchased.

The only reliable data in your possession from which these lists can be made out are the field-notes of the surveys on file in your office, and if the authorities of the State are willing to adopt these as the basis of those lists you will so regard them.

If not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them.

The following general principles will govern you in making up these lists, to wit:

Where the field-notes are the basis and the intersections of the lines of swamp or overflow with those of the public surveys alone are given, those intersections may be connected by straight lines, and all the legal subdivisions, the greater part of which are shown by these lines to be within the swamp or overflow, will be certified to the State; the balance will remain the property of the Government.

Where the State authorities may conclude to have the surveys made to determine the boundaries of the swamp or overflowed lands, those boundaries alone should be surveyed, taking connections with the nearest section or township corners; or where the swamp or overflowed lands are on the borders of a stream or lake, the stream or lake could be meandered and ordinates surveyed at suitable intervals from the borders of the stream or lake to the margin of
28 the swamp or overflowed lands, and by connecting the ends of those ordinates next to that margin by straight lines the

boundaries of the swamp or overflowed lands can be ascertained with sufficient accuracy.

In no case, however, should any such boundaries or ordinates be marked in the field, as they may produce difficulty in determining the lines and corners of the public surveys hereafter, and thus lead to litigation.

The selections in all the cases will be made as before directed. Where satisfactory evidence is produced that the whole of a township or of any particular and specified part of a township or the whole of a tract of country bounded by specified surveyed or natural boundaries is of the character embraced by the grant you will so report it.

The adjacent subdivisions, however, to be subject to the regulations above given, and in every case under each rule or principle herein prescribed forty-acre lots, or quarter quarter sections, will be regarded as the legal subdivisions contemplated by the law.

The affidavits of the county surveyors and other respectable persons that they understand and have examined the lines, and that the lands bounded by lines thus examined and particularly designated in the affidavit, are of the character embraced by the law should be sufficient.

The line of boundary of the overflow that renders the land unfit for regular cultivation may be adopted as that which regulates the grant.

You will make out lists of these lands as early as practicable, according to the following form, one copy of which you will transmit to the lands officers and another to this office. The land selected should be reserved from sale, and after those selections are approved by the Secretary of the Interior the register should enter all the lands so selected in his tract books as "granted to the State by act of 28th September, 1850, being swamp or overflowed lands," and on the plats enter on each tract, "State act 28th September, 1850." Copies of the approved lists will be sent to the registers for this purpose.

Your early attention is requested on this matter that the grant may be disposed of as speedily as possible.

29 Very respectfully, your ob'd't servant,

(Signed) J. BUTTERFIELD,

*Commissioner.*

Charles Noble, Esq., sur. gen., Detroit, Michigan.

| Part of section. | Section. | Township. | Range. | Remarks. |
|---|---|---|---|---|

And the plaintiff's counsel then read in evidence a copy of the same letter of instructions, addressed to the governor of the State of Michigan and bearing the same date, which was enclosed in a letter from the Commissioner of the General Land Office to the governor of the State of Michigan, which was then read by plaintiff's counsel and is as follows:

GENERAL LAND OFFICE, *Nov.* 21*st*, 1850.

SIR: I have the honor to enclose you a copy of the instructions this day sent to the surveyor general of your State for the selection of the swamp and overflowed lands to which the State will be entitled by the act of 28th September, 1850.

You will perceive that by those instructions the surveyor general is authorized to receive such reliable evidence of the character of any of these lands as may be presented by the authorities of the State, and as many of the lands were probably surveyed at dry seasons, and hence are not represented by the descriptive notes
30 or plats as being of that character, I have supposed that it may be a matter of sufficient importance to induce you to call upon the county surveyors, or other respectable persons of your State, for a statement under oath of the swamp or overflowed lands in their respective counties. Such testimony, you perceive, will be regarded as establishing the facts in the case, and on receipt of the reports of the surveyor general lists of the lands will be pre-ared, as required by the act submitted for the approval of the Secretary of the Interior, and plats and patents for the lands approved will at once be prepared and forwarded to you.

With great respect, your ob't serv't,

J. BUTTERFIELD,
*Commissioner.*

His excellency the governor of Michigan, Lansing, Mich.

And plaintiff's counsel then read in evidence the following letter:

SURVEYORS GENERAL'S OFFICE,
DETROIT, *Dec. 6th*, 1850.

His excellency John S. Barry.

SIR: I have the honor herewith to enclose to you a copy of instructions to me to designate the swamp lands granted to the State of Michigan by the act of Congress approved September 28th, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits." To enable me to carry out the views of the Government in making this grant I have to request of you information—

1st. Whether the State authorities are willing to adopt the
31 field-notes of the *soeveys* on file in this office as the basis of the lists of all lands thus granted to the State, or—

2nd. Whether the State authorities conclude to have the surveys made to determine the boundaries of the swamp or overflowed lands.

With great respect I am your ob't serv't,

CHARLES NOBLE, *Sur. Gen'l.*

And the plaintiff's counsel then read in evidence the following letter:

EXECUTIVE OFFICE, LANSING, *Dec'r 20th*, 1850.

SIR: I have the pleasure to acknowledge the receipt of your letter of the 6th inst.

Absence has prevented an earlier reply.

I am inclined to believe that a further survey would give to the State a far greater amount of swamp lands than are designated as such in the records of your office, but having no authority I hardly feel at liberty to incur the expense that would attend such survey. If all action could be delayed until the meeting of the legislature to which the matter could be submitted, I can hardly doubt that provision would be made for securing to the State all the benefits to be derived from the act of Congress in question.

I have the honor to be your ob't serv't,

JNO. S. BARRY.

Charles Noble, sur. gen'l, Detroit.

32 And the plaintiff's counsel then read in evidence the following letter:

Private.

SUR. GENERAL'S OFFICE, DETROIT, *Jan'y* 3, 1851.

His excellency John S. Barry.

DEAR SIR: I have received your letter of the 20th ult. I am persuaded from the examination of notes returning to this office that the amount of "swamp land" designated as such on the notes, taking all the unsold lands together, must be greater than would now be found from an actual resurvey of the whole, and I think there could be no doubt whatever that the net proceeds to the State would be much greater. The expense to the State of a resurvey of the whole peninsula (upper and lower) (for I do not see how it could properly be ascertained) short of a full survey of the whole would be very large and probably equal in amount the value of the lands designated by the act of Congress in question. The delay, too, necessarily attending the resurvey would be very great, and if no great advantages are to result therefrom the benefit to be derived from the act must be materially lessened.

From the examination already made of the notes of the surveyors returned to the surveyor general's office, I do not hesitate to say that in my judgment the true interest of the State will be much better promoted by making the designation of the "swamp lands" from the notes. I beg pardon for thus obtruding my opinion upon your consideration, but I know that you will appreciate my views and motives in so doing. I may add, perhaps with great propriety, that the views of the late sur. gen'l on this subject are the same as my own, as I have learned from a conversation with him upon the subject.

33 I am with great respect your ob'd't serv't,

CHARLES NOBLE.

Since closing this letter your favor of the 1st inst. has been received. I cannot find in the laws of Congress or in the instructions to me from the Gen. Land Office any authority for designating a portion of the "swamp lands" from the notes of the surveyors re-

turned to this office and a portion by a resurvey. My construction of the instruction were, that the whole were to be designated, either in the one way or the other. These lands are to be designated, all of them, from the notes of surveys in this office, unless the State authorities choose to survey. It will take some weeks to go through with the examinations of the notes and maps and my report will not probably be made before the middle of February, and possibly not until the 1st of March.

CHARLES NOBLE.

Plaintiff's counsel then read in evidence the admissions of the defendant's counsel, as follows: Governor Barry, in his message to the legislature, which bears date February 5th, 1851 (Joint Documents 1851, pp. 34 and 35), calls the attention of the legislature to this grant by the act of Congress of September 28, 1850, and suggests that they take some proper and immediate action upon the letters of instructions forwarded to him by Mr. Noble and by the Commissioner of the General Land Office.

And plaintiff's counsel then read in evidence the following letter:

SURVEYOR GENERAL'S OFFICE, ST. PAUL, *Jan'y 24th*, 1860.

Commissioner of the State land office, Lansing, Michigan.

SIR: I have this day forwarded to your address by "express" one box containing certain field-notes, plats, and documents, and
34 one tin case containing maps, being the balance of the field-notes, plats, maps, and papers relating to the public surveys in Michigan, remaining in this office, and required to be transferred to the State of Michigan under the acts of June 12, 1840, and March 3rd, 1845.

I enclose herewith 3 copies of inventory of the contents of box and case, two of which I shall feel obliged by you receipting and returning to me, in order to their being placed on file in this office and the General Land Office, Washington.

Very respectfully, your o*b*ed't serv't,

C. L. EMERSON, *Sur. Gen'l.*

P. S.—The express charges on the box and case have been paid to Jackson, the nearest point they will receive here.

And then read such portions of the inventory therein referred to as shows that the plats and field-notes relating to the United States survey of the land described in plaintiff's declaration were received by the land office of the State of Michigan February 6th, 1860.

Plaintiff's counsel then read in evidence the deposition of EDWIN H. PORTER, a witness sworn on behalf of the plaintiff, whose testimony is as follows:

Q. Where do you reside, Mr. Porter?
A. In Lansing.
Q. What is your business?
A. I am a clerk in the auditor general's office.

Q. Were you ever employed in the State land office?
A. I was.
Q. State how long you were employed there.
A. I went into the State land office in 1866—in the fall of '66.
Q. How long did you stay there?
A. I was there until about 1871.
35 Q. What time in 1871?
A. I think I left there July 1st, 1871.
Q. While you were employed there in that department what were your duties?
A. From Oct., 1866, to the first of July, 1867, I was employed as a clerk. From that time on until I left I was deputy State land commissioner.
Q. Were the duties of your office such that you were familiar with the business of the office?
A. Yes, sir.
Q. Did you have assess to the books and papers of that office?
A. Yes, sir.
Q. Do you know what are known as the original plats of the surveys that are on file in that office?
A. Yes, sir.
Q. How were they kept?
A. We kept them in forms of plats. As they came into the office they were made into books into plat form.
Q. Were those the plats from which sales and reservations were made?
A. No, sir.
Q. What use, then, was made of these plats?
A. They were kept for reference.
Q. I show you a certified copy of sec. 23, township 56 north, 33 west, being a certified copy of the original plat, and call your attention to the pencil lines and pencil marks. What can you say as to whether those marks were made on any of those plats while you were in the office? (Hands plat to Mr. Porter.)
A. No marking was ever made upon the original plats in the office, that I know of.
Q. Were comparisons ever made between the original plats and the various lists sent to the land office from the General Land Office, at Washington?
36 A. My recollections are that whenever we received lists from the General Land Office they were compared with the original plats to see which were State lands and which were not.
Q. What can you say as to the meaning of the letter "S" on your plats?
A. They were marked that way to indicate State lands.

Cross-examination:

Q. Did you ever examine the original of the plat, a copy of which was shown to you by Mr. Hobson?
A. Not that I am aware of.

Q. Of course, then, you know nothing about the letters or marks that appeared upon the original while you were in the office?

A. No, sir.

Q. Were the letters "S," that you refer to, on the original maps made with pencil or ink?

A. Well, I can't say positively, but my idea is that they were made with ink.

Which answer, on reading over the deposition before being subscribed, Mr. Porter corrected by saying the letters were in pencil.

Counsel for the plaintiff admits that the letters "S" on the original plat—copy of which is produced—are in pencil.

Q. Was there no other way of determining what were State lands or swamp lands than by this letter "S" that appears on the plats—no other way in the office I mean?

A. The office had lists or patents of lands from the United States Government.

Q. Don't you know, Mr. Porter, that the law then required, and now requires, that lists should be made and kept in that office of all -ands belonging to the State?

A. I suppose that is the case.

Q. These were so made, were they not?

A. I suppose so.

Q. Were not those lists made from the patents, and not from
37 the letters "S" on the plats?

A. Not that I know of.

Q. Do you mean to be understood, Mr. Porter, that the formal list required by the statute were made from these letters in pencil on the plats?

A. I don't know as I understand your meaning.

Q. Where did you get the evidence from which the lists that you said were made or are made?

A. They came from the United States Land Office.

Q. The evidence, then, in the land office that the State owned any particular tract of land was found, was it not, either in a patent from the United States or in some list of lands certified from the General Land Office to the State?

A. I think so.

Q. So I repeat, then, the evidence in the land office that the State owned any particular tract of land was that it was found in a patent or in some certified list from the General Land Office, and not that it was in any particular list of lands marked with the letter "S"?

A. I think so. I think those plats were only used for reference. It might have been in some isolated cases where the plats were not marked.

Q. Did you not find, in your experience, that the patents and certified lists did not always tally with the marks upon the plats?

A. Well, I do not remember any special case of that kind.

Q. Well, if no patent or list of -ands is found in the State land office which contains a tract or tracts marked with the letter "S"

upon this plat that has been produced, and this letter "S," as you have stated, indicates or stands for State or swamp land, then the patents and list would not tally with this map, would they?

38 A. I should think not; no, sir.

Q. Which, then, would be the evidence of the ownership of the State, the patent or list or this map?

Objected to as incompetent and irrelevant.

A. Well, my idea is that we should take the list or patent.

Q. When you were in the office as deputy if an application was made to you to purchase a tract of land which appeared on this map as marked with the letter "S," would you assume to sell it without some other evidence of ownership by the State?

A. Well, so far as my notice was, we did not use those plats at all in marking up.

Q. Do you know when or by whom those letters "S" were placed upon this map that has been produced?

A. I do not know.

Redirect examination:

Q. From what books were the sales made, Mr. Porter?

A. They were made from a table set of books specially made for making sales and marking.

Q. Were the original plats ever used for that purpose, to your knowledge?

A. No, sir.

Q. What can you say as to the tradition of the office as to who made the pencil marks on the original plats referred to here?

A. Well, sir, I have no knowledge who did make them.

Q. What was the general understanding in the land office?

A. That it was done by the General Land Office or surveyor general, though I have no personal knowledge who marked them at all.

Q. To your knowledge, were any markings ever made by the State land office on the original plats?

A. Not to my knowledge.

39 Recross-examination:

Q. Were the original plats ever used as the basis — making the lists from which you made sales?

A. I think they were not generally, though I presume they were referred to often.

Q. For what purpose would they be referred to?

A. Any purpose necessary.

Q. In what form were the lists of land which belonged or were supposed to belong to the State made and kept?

A. In long sheets.

Q. In long sheets and then put together in book or folio form?

A. Yes, sir; in folio form; tied together at the end.

And plaintiff's counsel then read in evidence the deposition of LELAND H. BRIGGS, a witness sworn on behalf of the plaintiff, whose testimony is as follows:

Q. Where do you reside, Mr. Briggs?
A. Lansing.
Q. What is your business?
A. Chief clerk in the State land office.
Q. How long have you been employed in the State land office?
A. About 15½ years.
Q. What have been your duties while so employed?
A. Clerk—deputy and chief clerk.
Q. While so employed have you been familiar with the records and papers in the office?
A. I have.
Q. I show you a certified copy of township 56 north, 33 west. (Hands copy to witness.) Can you state whether the original plats, of which this is a copy, are used for the purpose of making sales from?
40 A. They are referred to frequently for the purpose of determining the title to certain swamp lands or certain lands that are claimed by the State as swamp lands.
Q. Are they ever osed for the purpose of making sales?
A. They are not used in cases where the lands have been patented to the State, and are on our plat sales books, but are referred to frequently in cases where there are lands not on the sales books to determine whether they are State lands or not.

This answer refers particularly to State swamp lands.

Q. Is there anything on the original plat that would indicate what are swamp and what are not swamp lands?
A. I understand there is.
Q. State fully what that is.
A. Certain lead-pencil lines and the letter "S," made with the lead pencil on certain descriptions.
Q. Are those lines on the copy which you have before you?
A. Yes, sir; they appear here.
Q. What can you say as to whether or not those marks were made by your office?
A. They were not to my knowledge.
Q. Would you be in a position to know, from your duties as stated?
A. I think I would.
Q. What is the understanding in the office as to by whom they were made?
A. That they were made by or under the direction of the surveyor general of Michigan, under whose authority or direction the surveys were made.

Cross-examination:

41 Q. What has been the evidence of title which the State has received from the United States for lands acquired from it?

A. Of different kinds: University lands, I think, were selected and listed; the school lands, other than the indemnity school lands, were not listed; the internal improvement lands were, I think, selections made by agents of the State and confirmed by the department at Washington; I am not positive about that, however. I do not think there is any certification to the State from the Secretary of the Interior for the university and internal improvement lands.

Q. Whenever the act granting the lands called for the making of lists by the Secretary of the Interior or General Land Office and did not call for the issuing of patents, the lists have been taken as the evidence of title, have they not?

A. Yes, sir.

Q. In almost *in* all cases in which lands have come from the United States the title has been evidenced either by patents or lists, have they not?

A. Yes, sir; none are patented except the swamp lands—that is, none have been carried into patents except the swamp lands. I wish to make this qualification; I think many of them were certified, but I am not positive that all were.

Q. The grant of lands was made to the State in 1856 to aid in the construction of certain lines of railroads, was it not?

A. Well, I could not say positively as to that.

Q. What, Mr. Briggs, don't you know there was?

A. I know there has been a grant made for that purpose, but cannot say as to that particular year.

Q. Lists of the lands thus granted were made and certified to the State, were they not?

42 A. Nearly all of them were. I am speaking now from knowledge gained from the State land office. I know that certain lands claimed to have been granted to railroads, of which we have no lists in our office; no doubt there were lists made, but not all were filed in the land office.

Here the witness gave testimony tending to show that up to June 30th, 1885, there had been patented to the State of Michigan as swamp lands 5,665,886.66 acres, and stated that the State yet claimed as due it about 1,600,000 acres as swamp land.

Q. And you say there is something over 1,600,000 still claimed by the State?

A. Yes, sir.

Q. Now, what is the basis of that claim?

A. The field-notes and plats of the United States survey and lists made by the surveyor general, and a few lists made by the Secretary of the Interior, but the bulk of them are covered by the report of the surveyor general, except a portion by the Secretary.

Q. What portion was approved by the Secretary of the Interior?

A. As shown by the report of the Secretary of the Interior of June 30th, 1885, 61,498.27 acres.

Q. The bulk of these lands that are claimed, lists of which have not been approved by the Secretary of the Interior, are in towns, are they not, within which lists have been approved and the lands described in them patented to the State?

A. Well, I am not prepared to state definitely, but my impression is that many of them are in towns in which lands have been listed and patented, but the lists cover, in many of the towns, lands which have not been approved and patented.

Q. Many towns were resurveyed, were they not?

A. Yes, sir.

43 Q. Now, in making up the amount claimed by the State, do you not take all the lands which, by field-notes and plats, based upon original surveys, appear to be swamp, and all lands which, by field-notes and plats, based upon the resurvey, appear to be swamp?

A. In this statement which I make here it is based upon the report of the Secretary of the Interior, which he says has been selected under the act of Congress; and I will state further that, in my opinion, the State claims less than is shown by the report of the Secretary of the Interior appear to be claimed.

Q. Do I understand you that the Secretary of the Interior has reported 1,621,000 and odd acres, which you say the State still claims, are swamp lands to which the State is entitled?

A. I do. He makes statements of the amount selected and then the amount approved, and the difference makes the amount I show there.

Q. Where does the Secretary make any such report?

A. In messages and documents of 1885 & 1886, vol. 1, p. 365–367.

Q. Now, Mr. Briggs, is it not true that in this million and odd thousand acres are included a very large amount of lands that never appeared in any lists made by the surveyor general?

A. I could not say as to that, never having had occasion to foot up the aggregate of the several lists made by the surveyor general.

Q. Mr. Briggs, are you able to state whether the S. E. ¼ of N. W. ¼ of section 23 of town. 56 north, 33 west, appears in any lists of lands purporting to be swamp, made by the surveyor general for Michigan or by any one connected with the United States Government?

44 A. Not having had occasion recently to look it up, I am unable to state. I was not aware that I would be called upon to state.

It is admitted by counsel that there is no list on file in the office of the commissioner of the State land office which contains this description.

Q. Mr. Briggs, do I understand you that the State land office relies upon pencil marks upon plats as the evidence of title in the State to lands?

A. No, sir; you do not so understand. But I wish to explain further that the delineation in ink upon the plats is the basis from which we determine such lands as would be included in the swamp lands—that is, field-notes and delineations which are supposed to be drawn to a scale on the notes; certain points are then made on the margin, and lines drawn from one point to another, and the lands granted the State would be these covered within those lines.

Q. That is, if I understand you, the State claims the lands which appear on the plat, as you have described, are swamp lands to which it is entitled under the act of Congress of 1850?

A. Well, I don't clearly understand that question.

Q. The State land office claims that the State is entitled to have certified and patented to it, as swamp lands, all lands which appear on the plats as you have described?

A. It claims all lands as swamp lands that are shown by the field-notes and plats to be swamp under the ruling or law that was given to the surveyor general for designating them.

Q. And the State land office claims, does it not, that the Secretary of the Interior should certify lists containing those lands and cause patents to be issued?

45 A. The State land office does, and the State of Michigan does by its attorney general.

Redirect examination:

Q. When you speak of the surveyor general's list what do you mean by that?

A. The list that was made and certified by the surveyor general as including such lands as enured to the State of Michigan under the act of Congress of September 28th, 1850.

Q. It is a different list from that approved by the Secretary of the Interior?

A. Yes, sir.

Recross-examination:

Q. Is it not true, Mr. Briggs, that the lists approved by the Secretary of the Interior were made from the lists of the surveyor general as a basis?

A. Well, I suppose it to be so. I don't know it to be so. That is the supposition.

Q. The lists made by the surveyor general were sent by him to the Secretary of the Interior at Washington, were they not?

A. Well, those that are on file in the land office appear to be the original, but as to whether the surveyor general sent a list to Washington I do not know.

Q. You know from you- examination, do you not, Mr. Briggs, that the approved lists that are on file in the State land office cover, to a great extent, the same grant as the surveyor general's lists that are now found in that office—that is to say, they embrace the same townships as contained in the surveyor general's lists?

46 Q. Mr. Briggs, the descriptions found in the approved lists are the same as found in the surveyor general's list?

A. Yes, sir; though I believe there are a very few that are not.

Q. Now, Mr. Briggs, you know, from the way you know the other things, do you not, that the surveyor general's lists were made for the use of the Secretary of the Interior, and not for the State?

A. I don't know any such thing as that.

At this point, in answer to questions asked by the court, it was admitted by counsel for both of the parties hereto that lists purporting to be lists of the swamp lands covered by the grant of 1850 were approved by the Secretary of the Interior, and that certain supplementary lists, covering parcels supposed to have been omitted, were likewise approved by the Secretary of the Interior in the course of determining the grant.

Plaintiff's counsel then read in evidence the field-note- of the United States survey covering this section containing the land described in plaintiff's declaration, which are as follows:

47 Township 56, N. R. 33, West Mer Michigan.

*Field-Notes of U. S. Survey of Sec.* 23.

| | |
|---|---|
| West | Corrected on true line between sections 23 & 26 |
| | From post cor. to sections 23, 24, 25, 26. |
| | Sugar 10 N 34 W 25. |
| | Yellow birch 12, S 27 E 50. |
| 3,05 | Fir 10 in dia |
| 26,16 | Sugar 18 in dia |
| 39,90 | Set ¼ sec post |
| | Sugar 10 S 40 E 18 |
| | Do 10 N 6 W 16. |
| 49,55 | Cedar 10 in dia |
| 64,74 | Sugar 10 in dia |
| 79,80 | Sec cor. |
| | Land gently rolling sandy loam soil 2nd rate timber, sugar hemlock, birch, fir, maple cedar, pine, ironwood, spruce. |
| North | Between sections 22 & 23 var 8.30 E |
| | From post cor sections 22, 23, 26 & 27. |
| | Sugar 14 N 49 E 17. |
| | Maple 14 S 66 W 14 |
| 8,66 | Yellow birch 12 in dia |
| 10.00 | Enter swamp C. S. W. |
| 3150 | Leave swamp C. W. |
| 37.75 | Fir 10 in dia. |
| 40.00 | Set ¼ sec post. |
| | Sugar 12 S. 56 W. 17. |
| | Do 10 N 60 E 10 |
| 47.20 | Hemlock 10 in dia |
| 66.50 | Enter swamp C W N W |
| 80.00 | Set post cor. to sections 14, 15, 22, & 23 |

Cedar 10 S 21 C 11
Yellow birch 6 N 3 W 14.

48 Land except swamp rolling sandy loam soil 2nd rate timber spruce, cedar, alder, hemlock, birch, sugar, maple, ash, pine.

T 56 N. R. 33, W.

North Between sections 23 & 24 var 3.15 E.
29.61 Cedar 12 in dia
40.00 Set ¼ sec post.
Sugar 10 N 86 W 10
Do 10 S 52 E 17.
42.47 Fir 6 in dia
68.88 Cedar 12 in dia
80.00 Set post cor. to sections 13, 14, 23 & 24.
Yellow birch 16 N 23 W 35
Sugar 15 S 8 E 44
Land gently rolling 1st ¼ sandy soil remainder 2nd rate timber, hemlock, cedar alder, white pine, tamarack, sugar, maple.
West Corrected between sections 14 & 23
5.10 Sugar 9 in dia
25.35 Maple 6 in dia
27.00 Enter swamp C S E.
38.50 Old beaver dam
40.00 Set ¼ sec. post.
Tamarack 4 N 31 W 22
Do 3 N 9 E 51.
48.00 Leave swamp C. S. E.
54.45 Sugar 10 in dia
74.00 Enter swamp C. S. E.
80.00 Sec cor.

Land except swamp, rolling, sandy loam soil 2nd rate timber, sugar, hemlock, tamarack, spruce, maple, ash, alder, cedar.

Surveyed in 1845 by—

L. S. SCRANTON, *Surveyor.*

49 (29.)

*Official Certificate.*

STATE OF MICHIGAN, STATE LAND OFFICE,
LANSING, *April* 21, 1888.

I, Roscoe D. Dix, commissioner of the State land office, do hereby certify that the annexed is a true copy of the field-notes of the Government survey of section twenty-three (23), township fifty-six (56) north, of range thirty-three (33) west, Michigan; that I have carefully compared the said copy with the original thereof now on file and of record in my office, and that it is a correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and have caused the seal of this office to be affixed.

[SEAL.] Done at the city of Lansing on the day and year above written.

ROSCOE D. DIX,
*Commissioner of the State Land Office.*

50 Plaintiff's counsel then gave in evidence a certified copy of the plat of original survey of the township containing the lands described in plaintiff's declaration, which is as follows:

(29.)

*Official Certificate.*

STATE OF MICHIGAN, STATE LAND OFFICE,
LANSING, *September 17th*, 1889.

I, Roscoe D. Dix, commissioner of the State land office, do hereby certify that the annexed is a true copy of plat of the United States survey of township No. 56 north, of range No. 33 west, meridian of Michigan; that I have carefully compared the said copy with the original thereof now on file and of record in my office, and that it is a correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and have caused the seal of this office to be affixed.

Seal State Land Office.

Done at the city of Lansing on the day and year above written.

ROSCOE D. DIX,
*Commissioner of the State Land Office.*

{Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.}

(Here follows map marked p. 50*a*.)

51 (29.)

*Official Certificate.*

STATE OF MICHIGAN, STATE LAND OFFICE,
LANSING, *April 21st*, 1888.

I, Roscoe D. Dix, commissioner of the State land office, do hereby certify that the annexed is a true copy of the Government map or plat of township fifty-six (56) north, of range thirty-three (33) west, Michigan, as made by the surveyor general May 8, 1846; that I have carefully compared the said copy with the original thereof now on file — of record in my office, and that it is a correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and have caused the seal of this office to be affixed.

[SEAL.] Done at the city of Lansing on the day and year above written.

ROSCOE D. DIX,
*Commissioner of the State Land Office.*

52 Thereupon the court adjourned until the hour of ten o'clock a. m. of the 14th day of November, A. D. 1888, and opening at the time pursuant to adjournment.

Plaintiff's counsel then read in evidence certain documentary evidence tending to show that Houghton county, *of* the State of Michigan, April 28th, 1863, *eccepted* a grant of lands made by the legislature of the State of Michigan under an act entitled "An act for the appropriation of swamp lands to the counties of Houghton and Keweenaw for the construction of the mineral range State road," approved March 20th, 1863, which acceptance was filed in the office of the commissioner of the State land office June 30th, 1863.

That the State road provided for — said act of the legislature of the State of Michigan had been duly completed and accepted by the county of Houghton and such acceptance duly certified to the commissioner of the State land office, whereby the county of Houghton became entitled to the lands granted by the act of the legeslature of the State of Michigan and proper credit thereof given on the books of the land office of the State of Michigan.

That by assignment the plaintiff became the owner of the right to locate four hundred and eighty acres of State swamp lands in accordance with the said act of the legislature of the State of Michigan, and subsequently located at the State land office in pursuance of said act and with such credit the land described in his declaration herein and received a patent therefor from the State of Michigan bearing date November 3rd, 1887, and which was duly recorded in the office of the Secretary of State and duly recorded in the office of the register of deeds in and for the county of Houghton and State of Michigan November 7th, A. D. 1887.

And the plaintiff then offered oral evidence to show that the land in question was swamp in fact and wet and unfit for cultivation, except about seven acres on the west side and southeast corner,
53 and the land was so in 1850 and remained so at the present time, to which offer defendant's counsel objected, and the district judge reserved his ruling until certain proofs had been introduced on the part of the defendant.

And thereupon the defendant's counsel, in order to maintain and prove the issue upon the part of said defendant, offered, and the same were received and read in evidence, such portion of list number two on file in the General Land Office, in Washington, of land selected and approved to the State of Michigan under the act of Congress of August 26th, 1852, "for the construction of a ship canal around the Falls of St. Mary's, in the said State" as relates to the lands selected in section twenty-three (23), township fifty-six (56) north, of range thirty-three (33) west, in said State, as follows:

No. 2.

*Lake Superior District.*

| Tracts. | Sec. | Town. | Range. | Acres. |
|---|---|---|---|---|
| East half | 23 | 56 N. | 33 W. | 320 |
| S ½ n w ¼ | " | " | " | 80 |
| S w ¼ S w ¼ | " | " | " | 40 |
| E ½ S w ¼ | " | " | " | 80 |

GENERAL LAND OFFICE, *January* 24, 1855.

The foregoing list, No. 2, of land, on pages 1 & 2, selected by the duly authorized agents of the State of Michigan in the Lake Superior district under the provisions of the act of Congress approved August 26, 1852, entitled "An act granting to the State of Michigan the right of way and a donation of public lands for the construction of a ship canal around the Falls of St. Mary's, in said State," is respect-
54 fully submitted for the approval of the Secretary of the Interior, subject to any valid interfering rights.

JOHN WILSON,
*Commissioner.*

DEPARTMENT OF THE INTERIOR, *January 24th*, 1855.

The lands embraced in the foregoing list, selected by the duly authorized agents of the State of Michigan, as above stated, is hereby approved, subject to any valid interfering rights.

R. McCLELLAND, *Secretary.*

And the defendant's counsel then read and the same was received in evidence the patent of the State of Michigan to the St. Mary's Falls Ship Canal Company, containing the land in question, with others, which, excepting therefrom the descriptions not in townships 56 north, of range 33 west, State of Michigan, is as follows:

State of Michigan to St. Mary's Falls Ship Canal Company. } Patent. State of Michigan. No. 2, C. L.

To all to whom these presents shall come, Greeting:

In the name of the people of the State of Michigan.

Whereas by an act of Congress approved August 26th, 1852, seven hundred and fifty thousand acres of public land were granted to the State of Michigan for the construction of a ship canal around the Falls of St. Mary's, in said State;

And whereas by the act of the legislature of the State of Michigan approved February 5th, 1853, and an act supplamentary thereto approved February 12th, 1853, the governor was authorized to ap-

point commissioners to let the building of said canal and
55 agents to select the lands granted to the State as above mentioned;

And whereas, in pursuance of the above act, the governor did appoint commissioners to let the building of said canal and also agents to select said lands, and the said commissioners, by the authority of said appointments, did enter into a contract with Joseph P. Fairbanks, John M. Forbes, Frastus Corning, August Belmont, Henry Dwight, Jr., and Thomas Dyer for the building of said canal for the consideration of the grant of lands above mentioned, with a remission of all taxes assessed thereon for a period of five years from the time fixed for the completion of the canal, as by reference to said contract will more fully appear;

And whereas the said contractors did, under and in pursuance of the tenth section of the aforesaid act of the fifth day of February, 1853, assign all their rights, privileges, and remunerations under said contract to the St. Mary's Falls Ship Canal Company, a body co-porate, created under the act of the legislature of the State of New York passed April 12th, 1853, empowered to hold, sell, improve, and use lands in the State of Michigan, in pursuance of the tenth section of the act of the legislature of the State of Michigan approved February 5, 1853;

And whereas the said contractors did by their said assignment authorize the said company to receive the conveyance of the said land from the State of Michigan, with all the advantages, rights, privileges, and remunerations conferred by the said act of February 5, 1853, and the act supplementary thereto approved February 12, 1853;

And whereas the said lands have been selected and approved to the State according to law, as appears by the list thereof on file in the office of the commissioner of the State land office;

And whereas the said canal has been constructed and completed according to contract by the said St. Mary's Falls Ship Canal Company and accepted on behalf of the State in accordance with
56 and in pursuance of the aforesaid acts, as appears by the certificate of the commissioners, governor, and engineer on file in the office of the commissioner of the land office aforesaid, whereby the said St. Mary's Falls Ship Canal Company have become intitled to the aforesaid grant of lands as aforesaid:

Now, know ye that the State of Michigan, in consideration of the premises and in conformity with the several acts of the legislature in such case made and provided, hath given and granted, and by these presents doth give and grant, unto the St. Mary's Falls Ship Canal Company the following-described tracts of lands situated in the county of Houghton, State of Michigan, viz:

Township 56 north, range 33 west.

| | |
|---|---|
| 25 east half | 320.00 |
| 36 entire | 640.00 |
| 35 entire | 640.00 |
| 1 e ½ of s e ¼ | 80.00 |

| | | |
|---|---|---|
| 1 | w ½ of s w ¼ | 80.00 |
| " | e fr ½ of n w ¼ | 80.33 |
| 2 | s ½ of n w ¼ | 80.00 |
| 3 | s w ¼ | 160.00 |
| " | e fr ½ of n e ¼ | 81.15 |
| " | ½ of s e ¼ | 80.00 |
| 10 | n e ¼ of n e ¼ | 40.00 |
| " | s w ¼ | 160.00 |
| " | w ½ of s e ¼ | 80.00 |
| 11 | s e ¼ of n e ¼ | 40.00 |
| " | west half | 320.00 |
| " | e ½ of s e ¼ | 80.00 |
| 13 | west half | 320.00 |
| 14 | w ½ of s w ¼ | 80.00 |
| " | e ½ of s e ¼ | 80.00 |
| 15 | north half | 320.00 |
| " | n ½ of s w ¼ | 80.00 |
| " | n e ¼ of s e ¼ | 40.00 |
| 23 | s ½ of n w ¼ | 80.00 |
| 23 | s w ¼ of s w ¼ | 40.00 |
| 23 | east half | 320.00 |
| 24 | n e ¼ of n e ¼ | 40.00 |
| " | s ½ of n e ¼ | 80.00 |
| " | n w ¼ | 160.00 |
| " | south half | 320.00 |
| | 25 n w ¼ | 160.00 |
| 56½ | 26 n ½ of n e ¼ | 80.00 |
| | 25 west half | 320.00 |
| | Total No. acres | 5,561.48 |

To have and to hold the said tract of land, with the ap-urtenances and incidents thereof, unto the said St. Mary's Falls Ship Canal Company and to their assigns forever.

In testimony whereof I, Kingsley S. Bingham, governor of the State of Michigan, have caused these letters to be made patent and the great seal of the State to be hereunto affixed.

Given under my hand, at Lansing, in said State of Michigan, on this 25th day of May, in the year of our Lord one thousand eight hundred and fifty-five, and of the Independence of the United States of America the seventy-ninth.

KINGSLEY S. BINGHAM.

By the governor:

[Great Seal of the State.]

J. M. KINNEY,
*Secretary of State.*

Which patent was duly recorded in the office of the secretary of state of State of Michigan May 25th, 1855, and in the office of the register of deeds for the county of Houghton, State of Michigan, October 30th, 1875.

And thereupon the counsel for the plaintiff admitted that whatever title had been obtained by the St. Mary's Falls Ship Canal Company had been by mesne conveyances conveyed to and was now in the defendant, a corporation organized and existing under and by virtue of the laws of the State of Michigan.

Defendant's counsel then read in evidence the following, to wit:

1. A certified copy of a portion of a list of lands on file in the land office in the State of Michigan, prepared by the surveyor general for the State of Michigan as follows, to wit:

*Lake Superior Land District.*

| Subdivision. | Section. | Town. | Range. | Contents. | Remarks. |
|---|---|---|---|---|---|
| N w fl. ¼ of n w fl. ¼ | 1 | 56 N. | 33 W. | 40.46 | |
| S w ¼ of n w fl. ¼ | " | " | " | 40.00 | |
| N w fl. ¼ of n e fl. ¼ | 2 | " | " | 40.79 | |
| S w ¼ of n e fl. ¼ | " | " | " | 40.00 | |
| N e fl. ¼ of n w fl. ¼ | " | " | " | 40.96 | |
| S e ¼ | " | " | " | 160.00 | |
| 57 N w fl. ¼ of n e fl. ¼ | 3 | " | " | 41.08 | |
| S w ¼ of n e fl. ¼ | " | " | " | 40.00 | |
| W ½ of s e ¼ | " | " | " | 80.00 | |
| S ½ of s w ¼ | 9 | " | " | 80.00 | |
| S w ¼ of s e ¼ | " | " | " | 40.00 | |
| N w ¼ of n e ¼ | 10 | " | " | 40.00 | |
| S e ¼ of n e ¼ | " | " | " | 40.00 | |
| E ½ of s e ¼ | " | " | " | 80.00 | |
| W ½ of n e ¼ | 11 | " | " | 80.00 | |
| N e ¼ of n e ¼ | " | " | " | 40.00 | |
| W ½ of s e ¼ | " | " | " | 80.00 | |
| S w ¼ of s e ¼ | 13 | " | " | 40.00 | |
| N e ¼ | 14 | " | " | 160.00 | |
| E ½ of n w ¼ | " | " | " | 80.00 | |
| S w ¼ of n w ¼ | " | " | " | 40.00 | |
| W ½ of s e ¼ | " | " | " | 80.00 | |
| E ½ of s w ¼ | " | " | " | 80.00 | |
| W ½ of s e ¼ | 15 | " | " | 80.00 | |
| S e ¼ of s w ¼ | " | " | " | 40.00 | |
| N ½ of s e ¼ | 17 | " | " | 80.00 | |
| S e ¼ of s w ¼ | " | " | " | 40.00 | |
| S e ¼ of n e ¼ | 20 | " | " | 40.00 | |
| S w ¼ of s w ¼ | 21 | " | " | 40.00 | |
| E ½ of n w ¼ | 22 | " | " | 80.00 | |
| W ½ of n e ¼ | " | " | " | 80.60 | |
| E ½ of s w ¼ | " | " | " | 80.00 | |

*Lake Superior Land District*—Continued.

| Subdivision. | Section. | Town. | Range. | Contents. | Remarks. |
|---|---|---|---|---|---|
| S e ¼ | 22 | 56 N. | 33 W. | 160.00 | |
| N e ¼ of n w ¼ | 23 | " | " | 40.00 | |
| N w ¼ of s w ¼ | " | " | " | 40.00 | |
| N w ¼ of n e ¼ | 24 | " | " | 40.00 | |
| S ½ of n e ¼ | 26 | " | " | 80.00 | |
| N e ¼ | 27 | " | " | 160.00 | |
| E ½ of n w ¼ | " | " | " | 80.00 | |
| S w ¼ of n w ¼ | " | " | " | 40.00 | |
| N e ¼ of s e ¼ | " | " | " | 40.00 | |
| W ½ of s e ¼ | " | " | " | 80.00 | |
| S w ¼ | " | " | " | 160.00 | |
| S w ¼ of n e ¼ | 28 | " | " | 40.00 | |
| E ½ of n w ¼ | " | " | " | 80.00 | |
| S e ¼ | " | " | " | 160.00 | |
| S w ¼ of s w ¼ | 29 | " | " | 40.00 | |
| N ½ of n e ¼ | 32 | " | " | 80.00 | |
| S e ¼ of s w ¼ | " | " | " | 40.00 | |
| S w ¼ of s e ¼ | " | " | " | 40.00 | |
| E ½ of s e ¼ | " | " | " | 80.00 | |
| N ½ of n w ¼ | 33 | " | " | 80.00 | |
| N ½ of n e ¼ | " | " | " | 80.00 | |
| S w ¼ | " | " | " | 160.00 | |
| W ½ of s e ¼ | 33 | " | " | 80.00 | |
| N e ¼ of s e ¼ | " | " | " | 80.00 | |
| N w ¼ of n w ¼ | 34 | " | " | 40.00 | |
| N w ¼ of s w ¼ | " | " | " | 40.00 | |
| S e ¼ of s w ¼ | " | " | " | 40.00 | |
| S ½ of s e ¼ | " | " | " | 80.00 | |

I hereby certify that the foregoing list of "swamp lands" in the Lake Superior land district, in the State of Michigan, has been made out in conformity with instructions of the Commissioner of the General Land Office dated November 21, 1850, and his letter of 12th December, 1850, and that the location of said "swamp land" is determined by the rule laid down in said instructions of November 21, 1850.

CHARLES NOBLE,
*Surveyor General.*

Surveyer general's office, Detroit, May 11th, 1852.

2. A duly verified copy of a portion of a similar list of lands on file in the General Land Office, at Washington, as follows, to wit:

*List of Swamp Lands in the Lake Superior Land District, Michigan.*

| Subdivisions. | Sec. | T. | R. | Acres. |
|---|---|---|---|---|
| N w fr. ¼ of n w fr ¼ | 1 | 56 | 33 | 40.46 |
| S w ¼ of n e fr. ¼ | 2 | " | " | 40.00 |
| S w ¼ of n w fr. ¼ | 1 | " | " | 40.00 |
| N e fr. ¼ of n w fr. ¼ | 2 | " | " | 40.96 |
| N w fr. ¼ of n e fr. ¼ | 2 | " | " | 40.79 |
| S e ¼ | " | " | " | 160.00 |
| N w fr. ¼ of n e fr. ¼ | 3 | " | " | 41.08 |
| S w ¼ of n e fr. ¼ | " | " | " | 40.00 |
| W ½ of s e ¼ | " | " | " | 80.00 |
| S ½ of s w ¼ | 9 | " | " | 80.00 |
| S w ¼ of s e ¼ | " | " | " | 40.00 |
| N w ¼ of n e ¼ | 10 | " | " | 40.00 |
| S e ¼ of n e ¼ | " | " | " | 40.00 |
| E ½ of s e ¼ | " | " | " | 80.00 |
| W ½ of n e ¼ | 11 | " | " | 80.00 |
| N e ¼ of n e ¼ | " | " | " | 40.00 |
| W ½ of s e ¼ | " | " | " | 80.00 |
| S w ¼ of s e ¼ | 13 | " | " | 40.00 |
| N e ¼ | 14 | " | " | 160.00 |
| E ½ of n w ¼ | " | " | " | 80.00 |
| 59 S w ¼ of n w ¼ | 14 | " | " | 40.00 |
| W ½ of s e ¼ | " | " | " | 80.00 |
| E ½ of s w ¼ | " | " | " | 80.00 |
| W ½ of s e ¼ | 15 | " | " | 80.00 |
| S e ¼ of s w ¼ | " | " | " | 40.00 |
| N ½ of s e ¼ | 17 | 56 | 38 | 80.00 |
| S e ¼ of s w ¼ | " | " | " | 40.00 |
| S e ¼ of n e ¼ | 20 | " | " | 40.00 |
| S w ¼ of s w ¼ | 21 | " | " | 40.00 |
| E ½ of n w ¼ | 22 | " | " | 80.00 |
| W ½ of n e ¼ | " | " | " | 80.00 |
| E ½ of s w ¼ | " | " | " | 80.00 |
| S e ¼ | " | " | " | 160.00 |
| N e ¼ of n w ¼ | 23 | " | " | 40.00 |
| N w ¼ of s w ¼ | " | " | " | 40.00 |
| N w ¼ of n e ¼ | 24 | " | " | 40.00 |
| S ½ of n e ¼ | 26 | " | " | 80.00 |
| N e ¼ | 27 | " | " | 160.00 |
| E ½ of n w ¼ | " | " | " | 80.00 |
| S w ¼ of n w ¼ | " | " | " | 40.00 |
| N e ¼ of s e ¼ | " | " | " | 40.00 |
| W ½ of s e ¼ | " | " | " | 80.00 |
| S w ¼ | " | " | " | 160.00 |
| S w ¼ of n e ¼ | 28 | " | " | 40.00 |

*List of Swamp Lands in Lake Superior District*—Continued.

| Subdivisions. | Sec. | T. | R. | Acres. |
|---|---|---|---|---|
| E ½ of n w ¼ | 28 | | | 80.00 |
| S e ¼ | " | | | 160.00 |
| S w ¼ of s w ¼ | 29 | | | 40.00 |
| N ½ of n e ¼ | 32 | | | 80.00 |
| S e ¼ of s w ¼ | " | | | 40.00 |
| S w ¼ of s e ¼ | " | | | 40.00 |
| E ½ of s e ¼ | " | | | 80.00 |
| N ½ of n w ¼ | 33 | | | 80.00 |
| N ½ of n e ¼ | " | | | 80.00 |
| S w ¼ | " | | | 160.00 |
| W ½ of s e ¼ | " | | | 80.00 |
| N e ¼ of s e ¼ | " | | | 40.00 |
| N w ¼ of n w ¼ | 34 | | | 40.00 |
| N w ¼ of s w ¼ | " | | | 40.00 |
| S e ¼ of s w ¼ | " | | | 40.00 |
| S ½ of s e ¼ | " | | | 80.00 |

I certify that the foregoing is a correct list of the swamp lands in the townships herein enumerated made up in conformity with the instructions of the Commissioner of the General Land Office.

CHARLES NOBLE, *Sur. Gen'l.*

60 Surveyor general's office, Detroit, Feb. 12, 1853.

A duly certified copy of a portion of a list of lands on file in the General Land Office, at Washington, as follows, to wit:

*Swamp Lands.*

No. 6. A list of swamp and overflowed lands selected as inuring to the State of Michigan under the provisions of the act of Congress approved September 28th, 1850, in the district of lands subject to sale at Sault St. Marie, Michigan, viz:

| Parts of sections. | Sec. | T. N. | R. W. | Acres. | |
|---|---|---|---|---|---|
| W fr. ½ of n w fr. ¼ | 1 | 56 | 33 | 80.46 | Patent No. 16. |
| W fr. ½ of n e fr. ¼ | 2 | " | " | 80.76 | Do. |
| N e fr. ¼ of n w fr. ¼ | " | " | " | 40.96 | Do. |
| S e ¼ | " | " | " | 160.00 | Do. |
| W fr. ½ of n e fr. ¼ | 3 | " | " | 81.80 | Do. |
| W ½ of s e ¼ | " | " | " | 80.00 | Do. |

*Swamp Lands*—Continued.

| Parts of sections. | Sec. | T. N. | R. W. | Acres. | |
|---|---|---|---|---|---|
| S ½ of s w ¼ | 9 | 56 | 33 | 80.00 | Patent No. 16. |
| S w ¼ of s e ¼ | " | " | " | 40.00 | Do. |
| N w ¼ of n e ¼ | 10 | " | " | 40.00 | Do. |
| S e ¼ of n e ¼ | " | " | " | 40.00 | Do. |
| E ½ of s e ¼ | 10 | " | " | 80.00 | Do. |
| W ½ of n e ¼ | 11 | " | " | 80.00 | Do. |
| N e ¼ of n e ¼ | " | " | " | 40.00 | Do. |
| W ½ of s e ¼ | " | " | " | 80.00 | Do. |
| S w ¼ of s e ¼ | 13 | " | " | 40.00 | Do. |
| N e ¼ | 14 | " | " | 160.00 | Do. |
| E ½ of n w ¼ | " | " | " | 80.00 | Do. |
| S w ¼ of n w ¼ | " | " | " | 40.00 | Do. |
| W ¼ of s e ¼ | " | " | " | 80.00 | Do. |
| E ½ of s w ¼ | " | " | " | 80.00 | Do. |
| W ½ of s e ¼ | 15 | " | " | 80.00 | Do. |
| S e ¼ of s w ¼ | " | " | " | 40.00 | Do. |
| N ½ of s e ¼ | 17 | " | " | 80.00 | Do. |
| S e ¼ of s w ¼ | " | " | " | 40.00 | Do. |
| S e ¼ of n e ¼ | 20 | " | " | 40.00 | Do. |
| S w ¼ of s w ¼ | 21 | " | " | 40.00 | Do. |
| E ½ of n w ¼ | 22 | " | " | 80.00 | Do. |
| W ½ of n e ¼ | " | " | " | 80.00 | Do. |
| E ½ of s w ¼ | " | " | " | 80.00 | Do. |
| S e ¼ | " | " | " | 160.00 | Do. |
| N e ¼ of n w ½ | 23 | " | " | 40.00 | Do. |
| N w ¼ of s w ¼ | " | " | " | 40.00 | Do. |
| N w ¼ of n e ½ | 24 | " | " | 40.00 | Do. |
| S ½ of n e ¼ | 26 | " | " | 80.00 | Do. |
| N e ¼ | 27 | " | " | 160.00 | Do. |
| 61 E ½ of n w ¼ | 27 | " | " | 80.00 | Do. |
| S w ¼ of n w ¼ | " | " | " | 40.00 | Do. |
| N e ¼ of s e ¼ | " | " | " | 40.00 | Do. |
| W ½ of s e ¼ | " | " | " | 80.00 | Do. |
| S w ¼ | " | " | " | 160.00 | Do. |
| S w ¼ of n e ¼ | 28 | " | " | 40.00 | Do. |
| E ½ of n w ¼ | " | " | " | 80.00 | Do. |
| S e ¼ | " | " | " | 160.00 | Do. |
| S w ¼ of s w ¼ | 29 | " | " | 40.00 | Do. |
| N ½ of n e ¼ | 32 | " | " | 80.00 | Do. |
| S e ¼ of s w ¼ | " | " | " | 40.00 | Do. |
| S w ¼ of s e ¼ | " | " | " | 40.00 | Do. |
| E ½ of s e ¼ | " | " | " | 80.00 | Do. |
| N ½ of n w ¼ | 33 | " | " | 80.00 | Do. |
| N ½ of n e ¼ | " | " | " | 80.00 | Do. |
| S w ¼ | " | " | " | 160.00 | Do. |

*Swamp Lands*—Continued.

| Parts of sections. | Sec. | T. N. | R. W. | Acres. | |
|---|---|---|---|---|---|
| W ½ of s e ¼ | 33 | 56 | 33 | 80.00 | Patent No. 16. |
| N e ¼ of s e ¼ | 33 | 56 | 33 | 40.00 | Do. |
| N w ¼ of n w ¼ | 34 | " | " | 40.00 | Do. |
| N w ¼ of s w ¼ | " | " | " | 40.00 | Do. |
| S e ¼ of s w ¼ | " | " | " | 40.00 | Do. |
| S ½ of s e ¼ | " | " | " | 80.00 | Do. |

GENERAL LAND OFFICE, *January 10th*, 1854.

Respectfully submitted for approval.

JOHN WILSON, *Commissioner.*

DEPARTMENT OF THE INTERIOR, *January 11th*, 1854.

The selections embraced in the foregoing list are hereby approved subject to any valid legal rights that may exist thereto.

R. McCLELLAND, *Secretary.*

4. A copy of said last above described list, certified to be such by John Wilson, Commissioner of the General Land Office, at Washington, under date of Febroary 22nd, 1854, on file in the Michigan State land office.

The portions of said several lists omitted describe lands in other townships than those named in the portions so read in evidence.

5. A patent from the United States to the State of Michigan in the ordinary form of patents made by the United States to
62 said State for swamp lands enuring to it under the *the* act of Congress of Sep. 28th, 1850, and bearing date March 3rd, 1856, which patent described and conveyed to said State the lands described in said last above mentioned list, approved by the Secretary of the Interior.

Defendant's counsel then read in evidence from a statement of facts, stipulated by counsel for both parties to be true, as follows:

That the land in question in this case has never been patented by the United States to the State of Michigan as swamp land, and that no "list" and "plat" of swamp lands in Michigan made by or by the authority of the Secretary of the Interior of the United States under the legislation of the United States relative to swamp or overflowed lands or otherwise contained the land in question here.

2.

That in pursuance of and in conformity to the provisions of the following act of the legislature of the State of Michigan, entitled, namely, "An act to provide for the construction of a ship canal around the Falls of St. Mary's," approved February 5th, 1853, and "An act

supplementary to an act to provide for the construction of a ship canal around the Falls of St. Mary's," approved February 5th, 1853, approved February 12th, 1853, and an act of Congress entitled "An act granting to the State of Michigan the right of way and a donation of public lands for the construction of a ship canal around the Falls of St. Mary's, in said State," approved August 26, 1853, a contract in writing for the building of the canal in said act mentioned was, in the year 1853, made and entered into by and between Joseph P. Fairbanks, John M. Forbes, Erastus Corning, August Belmont, Henry Dwight, Jr., and Thomas Dwyer, on the part of the contractors, and the persons authorized by said Michigan legislation to enter into said contract, on the other part, whereby said contractors agreed to construct said canal in the manner and within the time in said legislation provided, in consideration of the conveyance of the granted lands in said act mentioned, with the remission of all taxes assessed thereon for the period of five years from the time fixed for the completion of said canal, which contract was duly executed by the parties thereto and duly approved as by said legislation provided.

3.

63 That on or before the 25th day of May, 1855, said canal was, under said contract, constructed and completed according to said contract by the St. Mary's Falls Ship Canal Company to the satisfaction and acceptation of the officers on the part of the State of Michigan, mentioned in said Michigan act approved February 5, 1853, and a proper certificate thereof signed and filed by them in accordance with section 6th of said act.

4.

That said St. Mary's Falls Ship Canal Company was a corporation or association organized under and according to the laws of the State of New York, and was, according to the provisions of section 10 of said act of February 5th, 1853, duly made a party to the obligation and emoluments of said contract, and that the said six natural persons last above mentioned, before May 25th, 1855, in pursuance of said section 10, assigned all their rights, privileges, and remunerations under said contract to said company, and authorized said company to receive a conveyance of said lands from the State of Michigan, with all the advantages, rights, privileges, and remunerations conferred by said two Michigan acts.

5.

That pursuant to said sections 6 and 9 of said Michigan act of February 5, 1853, the then governor of Michigan appointed agents in the year 1853 for the selection of said lands, and that before May 25, 1855, said agents selected and located said lands, as by said Michigan acts required, and that the said lands so selected by them were, before the day last aforesaid, approved by the Secretary of the Interior to the State of Michigan in conformity with said act of Congress; the form of such approval by the Secretary to be shown.

That among the lands so selected and approved was the land in controversy in this suit.

6.

That the route of said canal was established and plats and duplicates thereof filed, as required by section 6 of said act of Congress, before May 25th, 1855.

7.

That the land in question here has never been offered for
64 sale at public auction.

And plaintiff's counsel then admitted that after the expiration of the five years provided for by the act of the legislature of the State of Michigan the land in question had been assessed for taxes and the taxes paid by the St. Mary's Falls Ship Canal Company and its grantees.

And thereupon the defendant rested.

And plaintiff's counsel in rebuttal then read in evidence the following contract:

*Contract for the Construction of a Ship Canal Around the Falls of Ste. Marie.*

This indenture, made this fifth day of April, A. D. 1853, between Joseph P. Fairbanks, of St. Johnsbury, Vt.; John M. Forbes, of Boston, Mass.: Erastus Corning, of Albany, N. Y.; August Belmont and Henry Dwight, Jr., of New York, and Thomas Dwyer, of Chicago, Illinois, principals, and Franklin Moore, George F. Porter, John Owen, James F. Joy, Henry P. Baldwin, as sureties, of the first part, and the People of the State of Michigan, parties of the second part, witnesseth:

That the said parties of the first part, in consideration of the agreements of the parties of the second part hereinafter stated and by them to be performed, do covenant and agree to and with the parties of the second part that they will furnish all the materials, which shall be of sound and good quality, and perform all the labor necessary to construct and finish in every respect, in the most substantial and workmanlike manner, a ship canal around the Falls of Ste. Marie, in the State of Michigan, in all respects according to the specifications and plans hereto annexed and such additional specifications as shall be approved by the commissioners in behalf of the State for building said canal and the engineers, as shall be found necessary to finish the said canal in the most perfect manner, upon the basis of the specifications and plans hereunto annexed, so as to render the work consistant in all its parts, and to complete the same to the satisfaction of said commissioners, State engineer, and the governor of the State of Michigan within two years from the date of this contract.

65 And it is further agreed by the parties of the first part that if at any time any overseer or workman employed by the

parties of the first part shall be declared to be unfaithful or incompetent by the State engineer, on notice of such declaration the parties of the first part shall forthwith dismiss such person and shall no longer employ him on any part of the work.

And during such construction, if at any time said commissioners shall be dissatisfied with the manner of construction or the material used, it shall be competent for them or a majority of them to direct the contractor to construct the same in such other manner and to use such other materials as to such commissioners or a majority of them or engineer shall seem necessary to insure a permanent and durable work.

And further that the said commissioners shall have such powers in relation to the interruption of the railroad now existing at the portage as *is* provided for in the 11th section of an act entitled "An act provid*ed* for the construction of a ship canal around the Falls of Ste. Marie," approved Feb. 5, 1853.

1st part.

And it is further agreed by the parties of the first part that they will at any time after three months from the execution of this contract from time to time pay the costs and expenses provided for in the fifth section of the act before mentioned, as therein provided.

And the parties of the second part do hereby covenant and agree to and with the parties of the first part that on the completion of the said ship canal to the satisfaction of the said commissioners, State engineer, and governor of the State, and within the time hereinbefore mentioned, the parties of the first part or their assignees shall be entitled to receive patents from the State of Michigan for seven hundred and fifty thousand acres of land at one dollar and twenty-five cents per acre, to be located under the provisions of the act before mentioned.

And the parties of the second part further covenant and agree that all taxes assessed upon any lands and to be located as aforesaid within five years after the time herein fixed for the completion of said canal shall be remitted to the parties of the first part in pursuance of an act supplementary to the act before named, approved Feb. 12th, 1853:

66

Provided that when any of said lands shall be sold by said contractors the lands so sold shall be subject to taxation and the taxes assessed on lands so sold shall not be remitted.

It is mutually agreed that the act aforesaid and the act supplementary thereto before referred to and the plans and specifications herein mentioned are hereunto attached and made a part of this contract.

In testimony whereof the parties of the first part have hereunto set their respective hands and seals and the parties of the second

part have caused their commissioners thereunto appointed to affix their hands and seals this fifth day of April, A. D. 1853.

JOSEPH FAIRBANKS. [SEAL.]
I. M. FORBES. [SEAL.]
ERASTUS CORNING. [SEAL.]
AUGUST BELMONT. [SEAL.]
H. DWIGHT, JR. [SEAL.]
THOS. DYEY. [SEAL.]
C. JOSLIN,
H. LEDYARD,
SUB'L CONANT,
*St. Mary Canal Commissioners.*

Sureties:
FRANKLIN MOORE. [SEAL.]
GEO. F. PORTER. [SEAL.]
JNO. OWEN. [SEAL.]
JAMES F. JOY. [SEAL.]
H. P. BALDWIN. [SEAL.]

Witness:
JOHN N. DENISON,
*Wit. to I. M. Forbes.*
R. B. FORBES.

Wit.:
L. M. BARLOW,
*As to E. Corning & Belmont.*

Witness:
GERVASE WHEELER,
*Do. T. Dwyer.*
CHAS. T. HAWEY.

Approved.
A. CANFIELD, *Eng'n'r.*

The within contract approved by me May 19, 1853.
67 ANDREWS PARSONS.

And the foregoing is a substantial statement of all the evidence in the case.

The plaintiff's counsel then requested the court to charge the jury that, under the evidence in this case, the jury will return a verdict for the plaintiff.

And the district judge, after delivering his opinion, rejected the offer of oral evidence to show that the land in question was swamp land within the meaning of the act of Congress of September 28, 1850, and was such at the date of the grant; to which ruling the plaintiff then and there excepted.

And the district judge then refused to charge the jury as requested by the plaintiff and instructed the jury "that, upon the facts as they are made to appear in the case, the defendant is entitled to the ver-

dict," and directed them to render it accordingly; to which the plaintiff then and there excepted.

And the said issue under the instructions aforesaid was submitted to said jury and the said jury returned a verdict for the defendant and against the plaintiff that the said defendant was not guilty of holding the land described in plaintiff's declaration in the manner and form as charged against it.

And because none of the exceptions so made appear on the record of said trial, on the request of the counsel for the plaintiff this bill of exceptions has been settled and signed this 12th day of February, A. D. 1889, time having been duly extended for that purpose.

H. F. SEVERNS,
*District Judge.*

68 & 69 *Petition for Writ of Error. Filed May 9th*, 1889. *F. M. Moore, Dep. Clerk. Dan. H. Ball, Att'y for Pl't'ff.*

UNITED STATES OF AMERICA, } ss:
*Western District of Michigan,* }

To the honorable justices of the Supreme Court of the United States:

Now comes Joseph H. Chandler, of the city of Chicago, in the State of Illinois, by Dan. H. Ball, his attorney, and complains that in the records and proceedings and also in the rendition of judgment in a suit between said Joseph H. Chandler, plaintiff, and The Calumet and Hecla Mining Company, defendant, tried in the circuit court of the United States for the northern division of the western district of Michigan, at the September term thereof, A. D. one thousand eight hundred and eighty-eight, and in which judgment was rendered against him at the aforesaid term of said court, manifest error has intervened to the great damage of said Joseph H. Chandler.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

DAN. H. BALL,
*Attorney for said Plaintiff in Error.*

Allowed.
—— ——, *District Judge.*

70 *Writ of Error. Filed May 9th*, 1889. *F. M. Moore, Dep. Clerk. Dan. H. Ball, Attorney for Plaintiff.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, northern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you,

Honorable Henry S. Severens, district judge, sitting as presiding judge, between Joseph H. Chandler, plaintiff, and The Calumet and Hecla Mining Company, defendant, in a plea of ejectment, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, be- willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the ninth day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

CHARLES L. FITCH,
*Clerk of the Circuit Court of the United States*
*for the Western District of Michigan,*
By F. M. MOORE, *Deputy Clerk.*

This writ is hereby allowed May 4th, 1889.

H. F. SEVERENS, *Dist. Judge.*

71 *Bond on Writ of Error. Filed May 9th,* 1889. *F. M. Moore, Dep. Clerk.*

Supreme Court of the United States.

JOSEPH H. CHANDLER
*vs.*
CALUMET AND HECLA MINING COMPANY.

Know all men by these presents that we, Joseph H. Chandler, James H. Seager, and Samuel L. Smith, are held and firmly bound unto the Calumet and Hecla Mining Company of the State of Michigan in the sum of one thousand dollars, to be paid to the said Calumet and Hecla Mining Company, its successors or assigns; to which payment, well — truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this 22nd day of April, A. D. 1889.

Whereas the above-named Joseph H. Chandler has prosecuted a writ of error in the Supreme Court of the United States to reverse *to* judgment rendered in the above-entitled action by the circuit court of the United States for the northern division of the western district of Michigan:

Now, therefore, the condition of this obligation is such that if the

above-named Joseph H. Chandler shall prosecute his said writ of error to effect and answer to the costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOSEPH H. CHANDLER. [L. S.]
JAS. H. SEAGER. [L. S.]
SAUL L. SMITH. [L. S.]

The foregoing bond is hereby approved in form and substance. May 4, 1889.

H. F. SEVERENS,
*Dist. Judge.*

72 STATE OF MICHIGAN, } ss:
*County of Houghton,* }

James H. Seager, being duly sworn, deposes and says that he is worth the sum of one thousand dollars over and above all his just debts and liabilities and over and above all exemptions allowed by law.

JAS. H. SEAGER

Sworn to and subscribed before me this 27th day of April, A. D. 1889.

F. H. ROGERS,
*Notary Public, Houghton County, Michigan.*

[NOTARY SEAL.]

STATE OF MICHIGAN, } ss:
*County of Ingham,* }

Samuel L. Smith, being doly sworn, deposes and says that he is worth the ium of one thousand dollars over and above all his just debts and liabilities and over and above all exemptions allowed by law.

SAMUEL L. SMITH.

Sworn to and subscribed before me this 3rd day of May, A. D. 1889.

C. P. TEN EYCH,
[NOTARY SEAL.] *Notary Public, Ingham County, Michigan.*

73 *Citation.*

Due service of the within citation is hereby acknowledged this 10th day of May, A. D. 1889.

T. L. CHADBOURNE,
*Attorney for Defendant.*

Filed May 13th, 1889.

F. M. MOORE, *Dep. Clerk.*

UNITED STATES OF AMERICA:

Supreme Court.

JOSEPH H. CHANDLER, Plaintiff in Error,
*vs.*
THE CALUMET AND HECLA MINING COMPANY, Defendant in Error.

To the Calumet and Hecla Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held in Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and northern division of the western district of Michigan, wherein Joseph H. Chandler is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered *agai* against the said plaintiff in error, *als* in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry F. Severens, district judge, acting as presiding judge of the circuit court of the United States for said district, this fourth day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

H. F. SEVERENS,
*District Judge.*

74 *Assignment of Errors. Filed June 1st, 1889. F. M. Moore, Dep. Clerk.*

UNITED STATES OF AMERICA:

The Supreme Court.

JOSEPH H. CHANDLER
*vs.*
CALUMET AND HECLA MINING COMPANY.

Now, to wit, on th*h* twenty-eighth day of May, in the year of our Lord one thousand eight hundred and eighty-nine, comes the said Joseph H. Chandler, plaintiff in error, before the said court, by Dan. H. Ball, his attorney, and says that in the record and proceedings aforesaid and also in the giving of judgement aforesaid there is manifest error, in this, to wit:

1. The said circuit court erred in rejecting the offer of oral evidence, as set forth in the bill of exceptions, to show that the land in controversy was swamp land within the meaning of the act of Congress of September 28th, 1850, and was *was* such at the date of the said act.

2. Said circuit court erred in refusing to charge the jury, as requested by the plaintiff, that under the evidence they should return a verdict for the plaintiff.

3. Said circuit court erred in charging the jury that upon the facts as they are made to appear in the case the defendant is entitled

to a verdict and in directing said jury to render a verdict accordingly.

4. There is also error, in this, to wit, that by the record aforesaid *at* appears that the judgement aforesaid in form aforesaid was given for the said Calumet and Hecla Mining Company against the said Joseph H. Chandler, whereas by the law of the land the said judgement ought to have been given for the said Joseph H. Chandler and against the said Calumet and Hecla Mining Company.

And the said Joseph H. Chandler prays that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held
75 for nothing, and that he may be restored to all things that he has lost by occasion of the said judgment, etc.

DAN. H. BALL,
*Attorney for Plaintiff in Error.*

76 UNITED STATES OF AMERICA, }
*Western District of Michigan, Northern Division,* } *ss:*

I, Francis M. Moore, deputy clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, do hereby certify the above and foregoing to be true and correct copies of the original files and records in my said office in the cause herein entitled; that I have carefully compared the same with the original records and files now remaining of record in my said office; that the annexed are true and correct copies of said original records and files and of the whole thereof.

Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.

In testimony whereof I have hereunto set my hand and the official seal of said court, at the city of Marquette, in said district and division, this twenty-first day of September, A. D. one thousand eight hundred and eighty-nine.

FRANCIS M. MOORE,
*Deputy Clerk.*

Endorsed on cover: Case No. 13,797. W. Michigan C. C. U. S. No. 202. Joseph H. Chandler, plaintiff in error, *vs.* The Calumet and Hecla Mining Company. Filed October 17, 1889.

UNITED STATES OF AMERICA:

In the Supreme Court.

JOSEPH H. CHANDLER, Plaintiff in Error,
*vs.*
THE CALUMET AND HECLA MINING COMPANY, Defendant in Error.

Case 13,797. No. 202.
October Term, 1892.

In error to the circuit court of the United States for the western district of Michigan, northern division.

It is hereby stipulated by and between the parties to this cause that the annexed certified transcript of the record of an order of said circuit court setting aside the nonsuit and granting a new trial therein, and of the record of the trial, verdict, and judgment therein, may be filed as an addition to the record in said cause, and that the same shall become a part of the record thereof to the same effect as though said transcripts had been included as a part of the original return to the writ of error in said cause.

Dated October 6th, A. D. 1892.

DAN. H. BALL,
*Attorney for Pl'ff in Error.*

I. L. CHADBOURNE,
*Att'y for Def't in Error.*

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court-rooms, in the city of Marquette, in said district and division, on Saturday, the fourth day of August, in the year of our Lord one thousand eight hundred and eighty-eight, and of the year of Independence the one hundred — thirteenth.

Present: Hon. Henry F. Severens, U. S. district judge.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY.

The motion this day made and entered on behalf of the plaintiff to set aside the nonsuit in this case and that a new trial be granted therein came on to be heard, and was argued by counsel for the respective parties; and thereupon it is ordered by the court that said nonsuit and the judgment therein be set aside and a new trial granted therein on condition that the plaintiff, within ten days from this date, pay to defendant the costs of said nonsuit and of this motion, now taxed by the court at the sum of thirty dollars, and on the further condition that the plaintiff, within ten days from this date, make and file with the clerk of this court a stipulation waiv-

ing his right to a second new trial as a matter of right under the statute of the State of Michigan.

It is further ordered that in case the conditions of this order are complied with according to its terms the stipulations of fact filed herein and the testimony taken and on file herein shall be as available to the parties for use on the new trial as they would have been had the case been tried originally on the merits.

At an adjourned session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, began and held at the United States court-rooms, in the city of Marquette, in said division and district, on Tuesday, the thirteenth day of November, A. D. one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Present: Hon. Henry F. Severens, U. S. district judge.

In case of—

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY. } No. 203. Ejectment.

The parties in this cause being in court, by their respective attorneys, and ready for trial, thereupon came a jury, to wit, Raphael R. Thomas, O. F. Cheney, Nels. Clifton, Theodore Kruse, Michael Hennessy, Martin Peterson, Arnold Gage, Edward Robbins, Michael Cassidy, Jacob Muth, Joseph Simon, and Herman E. Bitner, good and lawful men, who, being duly impannelled, tried, and sworn well and truly to try the issue between the parties, sat together and heard the evidence this day adduced;

Whereupon the court adjourned to Nov. 14, 10 a. m.

UNITED STATES OF AMERICA:

Adjourned September Term, A. D. 1888.

WEDNESDAY, *November* 14, 1888.

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, U. S. district judge.

In case of—

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY. }

The jury heretofore duly impannelled and sworn in this case sat together and heard the conclusion of the evidence, the arguments of counsel, and the charge of the court, and, without leaving their panel, say upon their oaths that the said defendant is not guilty of unlawfully withholding the lands and premises as described in the plaintiff's declaration. Therefore it is considered that the said plaintiff take nothing by his suit, and that the said defendant do

go thereof without day; and it is further considered that *that* the said defendant do recover against the said plaintiff its costs and charges by it about its suit in this behalf expended, to be taxed, and that said defendant have execution thereof.

And it is further ordered that plaintiff be, and hereby is, allowed sixty days in which to settle bill of exceptions.

UNITED STATES OF AMERICA,
*Western District of Michigan, Northern Division,* } ss:

I, Francis M. Moore, deputy clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, do hereby certify the above and foregoing to be a true and correct copy of the record of the order of court, trial, and final judgment made, entered, and of record on the journal of said court in the cause therein entitled; that I have compared the same with the original journal entry now remaining of record in my office; that it is a true and correct copy thereof and of the whole thereof.

Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.

In testimony whereof I have hereunto set my hand and affixed the official seal of said court, at the city of Marquette, in said district and division, this twenty-fifth day of August, A. D. one thousand eight hundred and ninety-two.

FRANCIS M. MOORE,
*Deputy Clerk.*

Endorsed on cover: Case No. 13,797. Supreme Court U. S., October term, 1892. Term No., 202. Joseph H. Chandler, pl'ff in error, *vs.* The Calumet & Hecla Mining Co. Stipulation of counsel and addition to record. Office Supreme Court U. S. Filed Oct. 7, 1892. James H. McKenney, clerk.

UNITED STATES OF AMERICA:

In the Supreme Court.

JOSEPH H. CHANDLER, Plaintiff in Error,
*vs.*
THE CALUMET AND HECLA MINING COMPANY, Defendant in Error.

Case 13,797. No. 202.
October Term, 1892.

In error to the circuit court of the United States for the western district of Michigan, northern division.

It is hereby stipulated by and between the parties to this cause that the annexed certified transcript of the record of an order of said circuit court setting aside the nonsuit and granting a new trial therein, and of the record of the trial, verdict, and judgment therein, may be filed as an addition to the record in said cause, and that the same shall become a part of the record thereof to the same effect as though said transcripts had been included as a part of the original return to the writ of error in said cause.

Dated October 6th, A. D. 1892.

DAN. H. BALL,
*Attorney for Pl'ff in Error.*

I. L. CHADBOURNE,
*Att'y for Def't in Error.*

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court-rooms, in the city of Marquette, in said district and division, on Saturday, the fourth day of August, in the year of our Lord one thousand eight hundred and eighty-eight, and of the year of Independence the one hundred — thirteenth.

Present: Hon. Henry F. Severens, U. S. district judge.

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY.

The motion this day made and entered on behalf of the plaintiff to set aside the nonsuit in this case and that a new trial be granted therein came on to be heard, and was argued by counsel for the respective parties; and thereupon it is ordered by the court that said nonsuit and the judgment therein be set aside and a new trial granted therein on condition that the plaintiff, within ten days from this date, pay to defendant the costs of said nonsuit and of this motion, now taxed by the court at the sum of thirty dollars, and on the further condition that the plaintiff, within ten days from this date, make and file with the clerk of this court a stipulation waiv-

ing his right to a second new trial as a matter of right under the statute of the State of Michigan.

It is further ordered that in case the conditions of this order are complied with according to its terms the stipulations of fact filed herein and the testimony taken and on file herein shall be as available to the parties for use on the new trial as they would have been had the case been tried originally on the merits.

At an adjourned session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, began and held at the United States court-rooms, in the city of Marquette, in said division and district, on Tuesday, the thirteenth day of November, A. D. one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Present: Hon. Henry F. Severens, U. S. district judge.

In case of—

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY. } No. 203. Ejectment.

The parties in this cause being in court, by their respective attorneys, and ready for trial, thereupon came a jury, to wit, Raphael R. Thomas, O. F. Cheney, Nels. Clifton, Theodore Kruse, Michael Hennessy, Martin Peterson, Arnold Gage, Edward Robbins, Michael Cassidy, Jacob Muth, Joseph Simon, and Herman E. Bitner, good and lawful men, who, being duly impannelled, tried, and sworn well and truly to try the issue between the parties, sat together and heard the evidence this day adduced;

Whereupon the court adjourned to Nov. 14, 10 a. m.

UNITED STATES OF AMERICA:

Adjourned September Term, A. D. 1888.

WEDNESDAY, *November* 14, 1888.

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, U. S. district judge.

In case of—

JOSEPH H. CHANDLER
*vs.*
THE CALUMET AND HECLA MINING COMPANY. }

The jury heretofore duly impannelled and sworn in this case sat together and heard the conclusion of the evidence, the arguments of counsel, and the charge of the court, and, without leaving their panel, say upon their oaths that the said defendant is not guilty of unlawfully withholding the lands and premises as described in the plaintiff's declaration. Therefore it is considered that the said plaintiff take nothing by his suit, and that the said defendant do

go thereof without day; and it is further considered that *that* the said defendant do recover against the said plaintiff its costs and charges by it about its suit in this behalf expended, to be taxed, and that said defendant have execution thereof.

And it is further ordered that plaintiff be, and hereby is, allowed sixty days in which to settle bill of exceptions.

UNITED STATES OF AMERICA,
*Western District of Michigan, Northern Division,* } ss:

I, Francis M. Moore, deputy clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, do hereby certify the above and foregoing to be a true and correct copy of the record of the order of court, trial, and final judgment made, entered, and of record on the journal of said court in the cause therein entitled; that I have compared the same with the original journal entry now remaining of record in my office; that it is a true and correct copy thereof and of the whole thereof.

Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.

In testimony whereof I have hereunto set my hand and affixed the official seal of said court, at the city of Marquette, in said district and division, this twenty-fifth day of August, A. D. one thousand eight hundred and ninety-two.

FRANCIS M. MOORE,
*Deputy Clerk.*

Endorsed on cover: Case No. 13,797. Supreme Court U. S., October term, 1892. Term No., 202. Joseph H. Chandler, pl'ff in error, *vs.* The Calumet & Hecla Mining Co. Stipulation of counsel and addition to record. Office Supreme Court U. S. Filed Oct. 7, 1892. James H. McKenney, clerk.

149 U S 79

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 202.

**JOSEPH H. CHANDLER, Plaintiff in Error,**

*vs.*

**THE CALUMET AND HECLA MINING COMPANY, Defendant in Error.**

In Error to the Circuit Court of the United States for the Sixth Circuit, Western District of Michigan, Northern Division.

## BRIEF FOR PLAINTIFF IN ERROR.

FRANK E. ROBSON,
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McGILL & WALLACE, Printers, 1107 E St. N. W., Washington, D. C.

IN THE

# Supreme Court of the United States.

| | |
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| JOSEPH H. CHANDLER, Plaintiff in Error, *vs.* THE CALUMET AND HECLA MINING COMPANY, Defendant in Error. | October Term, 1892. Term No. 202. |

**In Error to the Circuit Court of the United States for the Sixth Circuit, Western District of Michigan, Northern Division.**

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement.

The action is ejectment, involving title to the S. E.¼, N. W.¼, section 23, Tp. 56 N., R. 33 W., Michigan (Record, pp. 1 and 2). The verdict, under instructions of the court (Record, pp. 42, 43), District Judge, Hon. H. F. Severens, presiding, was for defendant; judgment accordingly followed, and plaintiff, by writ of error (Record, pp. 43, 44, 45, 46), brings the case to this court for review.

The claim of title of plaintiff below and plaintiff in error here is as follows:

September 28, 1850, Congress passed an act granting to the State of Michigan, with other States, all swamp and overflowed lands within her borders, made unfit thereby for cultivation, and remaining unsold at the date of the passage of said act.

9 Statutes at Large, p. 519.

In the execution of the above-mentioned act of Congress the Commissioner of the General Land Office, acting for and on behalf of the Land Department, proposed to the State of Michigan as one of the methods of determining what lands were swamp and overflowed within the meaning of said act, the acceptance by the State of the field-notes of the government surveys as the basis of the selection.

Com. G. L. O. to Sur.-Genl., Nov. 21, 1850; Record, pp. 13, 15;

Com. G. L. O. to Gov. of Mich., Nov. 21, 1850; Record, p. 16;

Sur.-Genl. to Gov. of Mich., Dec. 6, 1850; Record, p. 16;

Gov. of Mich. to Sur.-Genl., Dec. 20, 1850; Record, pp. 16, 17;

Sur.-Genl. to Gov. of Mich., Jan. 3, 1851; Record, pp. 17, 18.

This proposition was accepted by the State by act of June 28, 1851, act No. 187, Session Laws of 1851.

Admission of defendant, Record p. 18.

Appendix to brief, No. 1.

The official field-notes, plats, and other documents connected with the survey of the township in which the premises in question are situated, were, at the time of survey, of platting, and of all official action had or taken thereon, in the custody, of the United States, and so remained until February 6, 1860, when they were trans-

ferred by the United States Surveyor-General to the Commissioner of the State Land Office, under the provisions of the acts of Congress approved June 12, 1840 (5 Stat., 384), and March 3, 1845 ( 5 Stat., 758).

Sur.-Genl. to State Comr., Jany. 24, 1860 ; Record, p. 18, *et seq.*

In the adjustment of its grant of swamp lands the State of Michigan made no selections, or lists of selections; but lists of lands, supposed to be swamp, were, from time to time, prepared by the United States and forwarded to the governor of the State, in supposed conformity to section two of the act of Congress of September 28, 1850. This appears from the official correspondence relative to adjustment of the grant, hereinbefore cited, and found from pages 13 to 18 of the Record.

The premises involved in the pending suit were shown by the field-notes of the survey of the township in which they are situated, and were also designated on the official plat of said survey retained in his office by the United States Surveyor-General for Michigan, as swamp and overflowed.

Field-notes; Record, pp. 26, 27 ;

Plat of township, pp. 28, 29 ;

Testimony of Edwin H. Porter, Record, pp. 18 to 21 ;

Testimony of Leland H. Briggs ; Record, pp. 22 to 26.

The land in controversy has never been patented by the United States to the State as swamp land, and the same has never been contained in any "list" and "plat" of swamp lands made by or by authority of the Secretary of the Interior under legislation of Congress relative to swamp and overflowed land.

Admission, Record, p. 38.

The United States has, among other lands amounting to many thousands of acres scattered promiscuously over the State, listed and patented to the State, as swamp and overflowed, certain lands in the township in which the premises here involved are situated, and two certain forty-acre tracts in section 23, township 56 N., range 23 W., being the section embracing said premises.

Record, pp. 33, 34, 35, 36, 37.

The claim of the State in respect to all the swamp lands within its limits, or within any particular prescribed area, is not yet settled or determined by the Land Department. There are yet claimed by the State as due it under said grant about 1,600,000 acres, in respect to which its claim has not yet been settled or determined.

Testimony of Leland H. Briggs, Record, p. 23;
Report Com. G. L. O. (1886), pp. 354, 355.

The premises in controversy were sold by the State of Michigan to Joseph H. Chandler, the plaintiff in error, as land inuring to her under the swamp grant of September 28, 1850, under authority and pursuant to the provisions of the act of her legislature of March 20, 1863, act No. 239, Session Laws of 1863, and were patented to him by the State under date of November 3, 1887.

Appendix to brief, No. 2;
Record, p. 29.

The defendant was in possession of the premises at the commencement of the suit, and the same are of the value of ten thousand dollars ($10,000) and upwards.

Admission, Record, p. 13.

After establishing his claim of title, as above set forth, plaintiff then offered oral evidence to show that all of the forty-acre tract in question, except about seven acres on the west side and southeast corner, was in fact swamp

and wet and unfit for cultivation; that the said land was so swamp, wet, and unfit for cultivation in 1850, and that it had remained so from that date to the date of trial; which offer the court below rejected, to which ruling the plaintiff then and there excepted.

Record, p. 29 (original transcript, pp. 52 and 53);
Record, p. 42 (original transcript, p. 67).

The grounds upon which this offer was rejected are suggested by the defendant's claim of title, and are stated in the opinion of the court which hereinafter follows.

The claim of title of the defendant below and defendant in error here is as follows:

By act of Congress approved August 26, 1852, there was granted to the State of Michigan (section 1) the right to locate a canal through certain public lands at the Falls of St. Mary in said State; and for the purpose of aiding said State in constructing and completing said canal there were also granted to said State (section 2) 750,000 acres of public lands—

"To be selected in subdivisions, agreeably to the United States surveys, by an agent or agents to be appointed by the governor of said State, subject to the approval of the Secretary of the Interior, from any lands within said State subject to private entry."

10 Statutes at Large, p. 35.

The State of Michigan accepted the above mentioned grant by act of her legislature, approved February 5, 1853; during the year 1853 the governor of said State appointed agents for the selection of the lands so granted and said agents selected certain lands in satisfaction of said grant, including the premises here in controversy.

Record, p. 39; act of February 5, 1853, Secs. 6 and 9; Appendix, No. 3.

January 24, 1855, the then Commissioner of the General Land Office submitted for the approval of the Secretary of the Interior, subject to any valid interfering rights, a certain list of lands, including the premises in controversy, as lands selected by agents of the State, under said act of Congress; and the then Secretary of the Interior, on said 24th day of January, 1855, indorsed upon said list the following:

"The land embraced in the foregoing list, selected by the duly-authorized agents of the State of Michigan, as above stated, is hereby approved, subject to any valid interfering rights."

Copy of list, Record, p. 30.

May 25, 1855, the then governor of Michigan issued to the St. Mary's Falls Ship Canal Company, to whom the title of the State to lands under this grant, whatever it was, had then passed, a patent for certain lands, including the premises in controversy.

The recitals of this patent limit it as a conveyance to such title as the State might have acquired under the canal grant by Congress of 1852, and the subsequent legislation of the State upon that subject.

Copy of patent, Record, pp. 30 to 32.

In the appointment of agents to make selections under the canal grant the governor was restricted to such names and such persons as might be designated to him, for such appointment, by the said St. Mary's Falls Ship Canal Company.

State act of 1853, Secs. 6 and 9; Appendix, No. 3.

It was admitted at the trial that whatever title to the premises in controversy had been obtained by the said St. Mary's Falls Ship Canal Company had, by mesne conveyances, been conveyed to and was then in the defendant in error, a corporation existing under the laws of the State of Michigan.

Record, p. 33.

After the presentation of evidence for the respective parties, plaintiff's counsel requested the court to charge the jury that under the evidence in the case they should return a verdict for the plaintiff, which request the court refused, and upon the contrary, instructed the jury "that upon the facts as they are made to appear in the case, the defendant is entitled to the verdict;" to which rulings the plaintiff then and there excepted.

Record, pp. 42, 43.

**The Opinion of the Court.**

The court below in its opinion (Record, pp. 11 and 12) substantially held:

1. That the Secretary of the Interior in determining the lands in respect to their character which fall within the swamp grant is the agent of the Government; that when he has discharged his duty in this regard and made a determination "throughout a State or a comprehensive locality" without objection by the State or resort by her to judicial or other proceedings, the State can not claim other lands as inuring to her under the grant upon evidence *in pais* that such lands were and are in fact swamp and overflowed, and that for these reasons the plaintiff could not recover in the case at bar.

2. That the State, in view of the proceedings had or taken under the grant for the benefit of the St. Mary's Falls Canal, could not be heard to say that she would claim title under the swamp grant of 1850, and that hence the plaintiff could not recover.

3. That the foregoing considerations necessarily resulted in excluding the offer of testimony to show the character of the land.

**Assignment of Errors.**

The errors assigned (Record, pp. 46 and 47) are as follows:

1. The said Circuit Court erred in rejecting the offer of oral evidence, as set forth in the bill of exceptions, to show that the land in controversy was swamp land within the meaning of the act of Congress of September 28, 1850, and was such at the date of the said act.

2. Said Circuit Court erred in refusing to charge the jury, as requested by the plaintiff, that under the evidence they should return a verdict for the plaintiff.

3. Said Circuit Court erred in charging the jury that upon the facts as they were made to appear in the case the defendant is entitled to a verdict, and in directing said jury to render a verdict accordingly.

4. There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid, was given for the said Calumet and Hecla Mining Company against the said Joseph H. Chandler, whereas by the law of the land the said judgment ought to have been given for the said Joseph H. Chandler and against the said Calumet and Hecla Mining Company.

**BRIEF.**

Upon the case as above stated plaintiff in error submits the following propositions:

I. The plaintiff was entitled, exclusive of the offer of oral testimony as to the character of the land, to a verdict, and the refusal of the court to so charge the jury was error, calling for a reversal of the judgment.

II. The plaintiff was undoubtedly entitled, at the point where it was offered, to introduce oral testimony show-

ing that the land was swamp and overflowed at the date of the swamp-land grant and had ever since so remained; and the exclusion of such testimony was error, calling for a reversal of the judgment. And as incidental to this general proposition:

(*a*) There has never been any action by the Secretary of the Interior segregating or identifying this land as swamp or otherwise.

(*b*) There is no estoppel upon the State arising from the facts and circumstances of the canal grant.

## I.

### Plaintiff's Title Without the Oral Testimony.

Upon the facts shown by the record the title of the plaintiff in error is good, and upon it he was entitled to a verdict and judgment without oral proof of the actual character of the land.

That the swamp-land act of 1850 operated as a grant *in præsenti* to the states then in existence, including the State of Michigan, and vested title as of the date of its passage, is settled by abundant and uninterrupted authority.

Railroad Co. *v.* Smith, 9 Wall., 95;
French *v.* Fyan, 93 U. S., 169;
Martin *v.* Marks, 97 *Ib.*, 345;
Rice *v.* S. C. & St. P. R. R. Co., 110 U. S., 695;
Wright *v.* Roseberry, 121 U. S., 488.

Starting, then, with this fundamental consideration, it is entirely clear that if the tract in controversy is shown by the record to have been swamp and overflowed at the date of the act of September 28, 1850, then the plaintiff has the paramount and conclusive legal title. In other words, if by any proper and legitimate means, identification of the tract in question as swamp and overflowed

land appears in the record, then the charge of the court below was error, the jury should have been charged to find for the plaintiff and the judgment of this court should remand the case for new trial.

Such an identification, independently of any present investigation as to the fact, appears in the record. It was accomplished by one of the means and in one of the methods adopted by the United States and accepted by the State as a rule of determination. The State, upon such identification, became entitled to a patent for the land, and her legal title thereto, now vested in the plaintiff, is good.

By section two of the granting act of September 28, 1850, it was made the duty of the Secretary of the Interior to make and transmit to the governor of the State an "accurate list and plats" of the lands inuring to the State under the provisions of this statute. In executing this provision of law the Secretary of the Interior proposed to the State authorities that the field-notes of the government surveys should be adopted as the basis for determining or ascertaining the character of the land, and the State accepted this proposition and assented that the official government field-notes might be resorted to for this purpose. The result of the application of this test to the premises in controversy was that by this criterion alone the land was determined to be swamp and overflowed. The exact method in detail of adapting or applying the field-notes to the plats and thus identifying particular tracts is given in the letter of the Commissioner to the Surveyor-General, dated November 21, 1850, at page 14 of the record. It was there directed that where the field-notes were taken as the basis of determination, the intersections of the lines of swamp or overflowed lands with the lines of the public surveys might be connected by straight lines, and that all legal subdivisions, the greater

part of which were found to be within these lines, should be certified to the State as swamp.

The field-notes of the survey of the section in question (pp. 26, 27) show that the survey was commenced at the southeast corner of the section; whence the survey ran west, corrected upon a true line between sections 23 and 26, to the southwest corner of said section 23; that thence, north between sections 22 and 23, the deputy surveyor ran 10.00 chains, at which point he entered a swamp whose course was southwest; that thence proceeding north he passed through said swamp a distance of 21.50 chains; that thence, still proceeding to the north, he again, at the distance of 66.50 chains, entered swamp the course of which was west-northwest; that thence, proceeding north 13.10 chains, he set the corner post at the northwest corner of the section; that thence, returning to the southeast corner of the section, the survey ran north to the northeast corner of said section; that thence, running west along the northerly line of said section, the deputy, at 27 chains, entered swamp course southeast; that thence proceeding he passed through 21 chains of said swamp, at 38.50 chains noting an old beaver dam; that thence, leaving said swamp at 48.00 chains, he proceeded west and at 74 chains entered the swamp already encountered at the northwest corner of the section, and at a further distance of 6 chains reached the section-post corner already established.

Applying, under the rule above noted, these field-notes to the plat, and it results in throwing the greater part of the premises in controversy within two straight lines drawn between the intersections of swamp and government survey lines. The situation is approximately shown by the plat found at pages 28 and 29 of the record. It will be observed upon inspection that the greater part of the premises in controversy, to wit, the $SE\frac{1}{4}$ $NW\frac{1}{4}$ of said

section, lies between two of these intersecting lines, and that hence under the rule of determination adopted the entire forty-acre tract is identified as swamp.

Should there be any doubt upon this point, however, that doubt is resolved in favor of the swamp and overflowed character of the land by reference to the official marks upon the plat prepared from these field-notes, being the exhibit already referred to. It will be observed that this particular forty-acre tract, with many others, is marked with the capital letter "S." The explanation of this mark is found in the testimony of the witnesses Porter and Briggs (pp. 18 to 26), from which it appears that this was a mark adopted by the United States Surveyor-General for the State of Michigan to designate upon the United States plats lands inuring to the State under the swamp grant. These witnesses had been employed in official capacities in the State Land Office, Mr. Porter from 1866 to 1871, and Mr. Briggs for fifteen and a half years prior to the date of giving his testimony. From their testimony it appears that the mark in question has existed upon said plat from their earliest knowledge of the same, and there can be no reasonable doubt that it appeared thereon in 1860, when the United States Surveyor-General turned over the plat in question to the Commissioner of the State Land Office.

We have, then, by fair deduction, the fact that the United States Surveyor-General, while this plat was still within his custody, placed thereon the usual official mark to show that the entire forty-acre tract was to be classed as swamp and so returned to the General Land Office. There can be no reasonable doubt that it was the intention of that officer at the time of making up his list to be reported to the Commissioner, to include this particular forty acres as swamp, and that its omission from his list and the consequent fact that no patent has ever issued

thereon, were results of a mere clerical mistake in compiling the list. The fact that the field-notes and the construction given them by the Surveyor-General made this particular forty acres swamp can not be reasonably doubted. The plat speaks for itself and designates the land as swamp.

It will be borne in mind in this connection that in making up his list of swamp and overflowed land, the Surveyor-General was not confined entirely to the field-notes, but that under his instructions he was at liberty, even where the field notes had been accepted by the State, to base his conclusion upon other evidence as to the character of the land. The very method proposed, that of connecting intersecting points by straight lines, was itself suggestive of great difficulty. Bodies of land entirely swamp might frequently lie within the exterior lines of a section and hence not be touched at any point by a line actually run upon the ground. The deputy-surveyor himself might have positive knowledge of such instances, and yet nothing indicating the fact would appear in his notes of survey. Indeed this very difficulty is mentioned and commented upon by the Surveyor-General in his report to the Commissioner of 1851.

Commissioner's Report for 1851.

Hence in this very case it may have been the fact that the Surveyor-General was in possession of information or evidence indicating that the entire body of this particular forty-acre tract was swamp, even if the greater portion of such tract was not included within the intersecting lines. He may have had actual knowledge of the fact which plaintiff, in the case at bar, offered to prove by parol evidence, and it might have been upon such considerations as these, as well as upon bare inspection of the plat after applying the field-notes thereto, that he designated the tract upon the plat as swamp.

That this was the fact in reference to other forty-acre tracts in this township is apparent from bare inspection of the plat itself. For instance, the S. W.¼ of the S. E.¼ of section 17 is designated as swamp, whereas the greater portion of said forty is clearly without the intersecting lines. And as to the S.½, N. E.¼ of section 12 and S.½, N. W.¼ of section 26, these tracts are clearly within the lines but are not designated as swamp. All of which indicates an exercise of judgment not based entirely upon the lines. It thus seems certain that the Surveyor-General had recourse, as was his right, to other evidence than that literally furnished by the delineation of these intersecting lines. And it is possible that such evidence in relation to the tract in controversy was presented to him and furnished an additional reason for designating the tract as swamp and overflowed.

It is also to be borne in mind that the list of swamp and overflowed lands as prepared by the Surveyor-General for transmission to the Secretary was made up from designations previously made upon the plats. In other words, the plat with swamp lands designated thereon was the foundation and basis of the list. Hence the plat itself is to be taken as an adjudication by the proper subordinate of the Secretary of the facts relative to the character of all lands embraced within the plat. The list was a mere clerical report to the Department. In case of any disagreement or variance between the two, the plat itself is the record of the original adjudication and must be taken as representing the decision of the executive upon that point. The only instance where the land department has passed directly or indirectly upon the character of this land is in the annotation made upon this plat, and this annotation is an adjudication in favor of the swamp character of the tract.

That the plat or other papers upon which the list is based and not the list itself constitute the real adjudication was expressly decided by the Secretary of the Interior in :

State of Michigan, 1 L. D., page 514.

It follows as the result of these considerations that the tract in controversy was fully identified and set apart as swamp by the rule of determination adopted by the Government, and that this identification, according to this rule, was complete and perfect.

This being so, the failure of the Surveyor-General to list and of the Secretary of the Interior to patent the tract can have no effect upon the situation, for a patent was not necessary to pass the title.

Wilcox *v.* Jackson, 13 Pet., 498, 516;
Grignon's Lessee *v.* Astor, 2 How., 319, 344;
Reichart *v.* Phelps, 6 Wall., 160;
Langdeau *v.* Hanes, 21 *Ib.*, 521;
Ryan *v.* Carter, 93 U. S., 78;
Morrow *v.* Whitney, 95 *Ib.*, 551.

Indeed, the grant is of greater weight than a patent.

Whitney *v.* Morrow, 112 U. S., 693, 696.

The State having, under the act, a vested right to a patent, is to be regarded as the absolute owner, as much so as if a patent had issued.

Stark *v.* Starrs, 6 Wall., 402;
Wirth *v.* Benson, 98 U. S., 118.

It follows that the court below erred in refusing to charge the jury that plaintiff was entitled to a verdict and in charging that defendant was so entitled under the evidence.

But however this may be, it is entirely clear that it was a question of fact for the jury whether the field-notes

and plat, under this rule of determination, made the land swamp and overflowed or otherwise. Taken at the worst for the plaintiff, the question whether this tract had been identified by the field-notes and plat as swamp was one for the jury to determine, and the charge of the court which removed that question from the jury by directing them to find a verdict for the defendant was manifest error which calls for reversal of the judgment and a new trial. Our exception to the charge of the court (pp. 42, 43) preserves this point and entitles us to review upon writ of error.

## II.

### The Exclusion of the Oral Testimony.

But the claim of the plaintiff rests upon even more certain foundation. It is submitted with the utmost confidence that independently of any question of prior identification, the plaintiff had the right, by parol testimony, to prove the character of the tract in question at the date of the swamp grant and thus identify it as a piece or parcel of land which passed to the State, under said grant, on the 28th day of September, 1850.

The field-notes of the survey and the annotation made upon the township plat in the Surveyor-General's office were an adjudication as to the character of the land; or, upon the contrary, they were not. If they were such an adjudication, then the tract is already identified and title to it vested in 1850. If they are not such an adjudication, then, in respect of this tract, the Secretary of the Interior has utterly failed to make the identification required by the act, and it is competent for the State or her grantee to do so by parol testimony in any court and in any form of proceeding where it may be material.

This question is by no means a new one in this court. On the contrary, the question has repeatedly arisen, and the court has uniformly recognized this right to resort to parol testimony, under the circumstances stated. In at least three well-considered cases this doctrine has been positively and directly declared to be law.

In Railroad Company *v.* Smith, 9 Wall., 95, the question directly arose and was directly decided. The suit was ejectment, and the plaintiff, the railroad company, claimed under the grant to the State of Missouri approved June 10, 1852. This grant was *in præsenti*, the land fell within its general descriptive terms and the State had duly conferred its title upon the plaintiff. The defendant, as grantee of the State, relied upon the swamp-land grant of 1850. The land had never been certified or patented to the State as swamp, and no evidence of its character sufficient to authorize such a certificate or patent was in possession of the Land Department. To support his title the defendant, under objection, introduced parol evidence to show the character of the land, and the admission of this testimony was the error assigned and brought to this court for review. The court held that the testimony was competent, and in delivering its opinion, by Mr. Justice Miller (pp. 99 and 100), said:

"By the second section of the act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact, and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the State might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the State to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the

land department with the State officers, he must, if he had attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims—a grant which was also a gratuity?

"The matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose."

Mr. Justice Clifford alone dissented from the otherwise unanimous judgment of the court, placing his dissent entirely upon the opinion that no title whatever passed out of the United States until the identification of swamp lands by the Secretary of the Interior.

In French *v.* Fyan *et al.* (93 U. S., 169) the action was ejectment, in which a patent for swamp lands, under which the defendant claimed, was sought to be avoided by offer of oral testimony tending to show that the land in controversy was not in fact swamp and overflowed. The trial court and this court upon appeal held that the testimony under such circumstances was inadmissible on the express ground that the decision of the Secretary resulting in the issue of the swamp patent was the judgment of a special tribunal as to the fact in controversy, which was binding upon and concluded the court. The opinion then proceeds to distinguish the case from that presented to the court in Railroad Company *v.* Smith (*supra*), and in this connection Mr. Justice Miller, speaking for the court (p. 173), said:

"In that case (Railroad Company *v.* Smith) it was held that parol evidence was competent to prove that a particular piece of land was swamp land within the meaning of the act of Congress. But a careful examination will show that it was done with hesitation and with some dissent in the court. The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever and would issue no patents, although many years had elapsed since the passage of the act."

The court thereupon quotes with emphasis the latter paragraph which we have printed above from the decision in the Railroad-Smith case, and then adds:

"There was no means, as this court has decided, to compel him (the Secretary) to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty."

In Emigrant Company *v.* Wright (97 U. S., 340) the court, by Mr. Justice Miller, referring to the notorious fact, specially appearing in that case, that the various Secretaries of the Interior had been extremely neglectful in discharging the duty of identification prescribed by the act of 1850, at page 340, said:

"For some reason, not necessary to be inquired into now, but which has been the source of much controversy between the States and the Department of the Interior, and also of much litigation between parties claiming under the grant and those claiming adversely to it, the Secretary failed to make any such selections and lists of swamp lands as the act contemplated, except as he was induced to make partial and imperfect lists at the suggestion of persons acting for the States on various occasions."

The case of Martin *v.* Marks (97 U. S., 345), while not directly involving the question here at bar, nevertheless incidentally called for the following expression by Mr. Justice Miller in delivering the opinion of the court (pp. 346 and 347):

"In Emigrant Company *v.* County of Wright (*supra*, p. 339) we had occasion to comment on the failure of the Secretary of the Interior to make out and certify to the States lists of the swamp lands to which they were severally entitled and the expedients to which they were compelled to resort to obtain the evidence of their title to those lands. We also held in previous cases that when this was ascertained and the lands were identified by proper authority the title related to the date of the grant, namely, Sept. 28, 1850, and superseded any subsequent grant or evidence of title issuing from the United States. (Railroad Company *v.* Smith, 9 Wall., 95; French *v.* Fyan *et al.*, 93 U. S., 169.)"

The case of Wright *v.* Roseberry (121 U. S., 488) involved directly the element of parol testimony to show the character of land as swamp or otherwise. The suit was ejectment, or its equivalent under the laws of the State of California. The title of the plaintiff was asserted under the swamp-land grant of 1850, and certain subsequent special legislation of Congress applicable only to California, viz., the act of Congress of July 23, 1866. (14 Stat., 218.)

No certificate or patent had ever issued to the State. The claim of the plaintiff rested entirely upon the act of 1850 for title and testimony outside of the government records for identification. The defendants claimed under patents of the United States, issued under the pre-emption laws. The judgment of the Supreme Court of the State was adverse to the swamp title, and the case as it reached this court presented, among other points, the question of the right of the plaintiff to show the character of the land by parol. The opinion of the court, de-

livered by Mr. Justice Field, is an elaborate and exhaustive review of the history of the swamp grant and a comprehensive and terse declaration of existing law, in the light of probably every known authority, executive, state or federal. The learned justice, before proceeding to a discussion of the particular features of the case then at bar, as affected by the special act applicable only to California, first covers those features of the general act applicable indiscriminately to all the states. He in this connection reviews, first, cases where patents have been held unnecessary to pass title under present grants; second, the departmental decisions giving construction to the act of 1850; third, opinions of the Attorney-General upon the same subject; fourth, the decisions of state courts in the same line, and, fifth, the decisions of this court applicable to the subject. As a general result, growing out of the concurrent authority of these decisions, the learned justice, at page 509, thus states the law:

"The result of these decisions is, that the grant of 1850 is one *in præsenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible where the Secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character."

Here, then, are three decisions of this court fully recognizing the proposition that parol evidence is admissible to identify lands falling within the swamp grant. In

Railroad Company *v.* Smith that was the sole and only question presented, and there is no distinction or difference whatever between that case and the case at bar, except that in the former the testimony was offered for the defendant instead of the plaintiff in ejectment. In French *v.* Fyan the general doctrine is again clearly announced, and in Wright *v.* Roseberry the principle is reiterated with emphasis after elaborate consideration and discussion of every authority bearing on the subject.

The doctrine thus announced and upon which we rely is that where the Secretary has neglected or failed, under the provisions of the second section of the act of 1850, by some legal or proper method to identify a tract of land which, as matter of fact, was swamp and overflowed in 1850, it is competent for the State or its grantee, in any forum and in any form of action where it may be material, to establish the real fact by parol testimony and thus identify land as inuring to the State under the grant. This, we submit, is the clear doctrine of the above authorities and conclusive of the question at bar.

No distinction is to be drawn between the case of Railroad *v.* Smith and the case now under consideration, because in the Smith case the swamp title was set up on behalf of the defendant, while here it is asserted to maintain the claim of the plaintiff in ejectment. There is no reason whatever why the rule of evidence should apply in one case and not the other. The question is not whether the weight of evidence to sustain the case is upon one party or the other, but simply whether evidence of a particular class is admissible. Treated from the standpoint of *admissibility* there can be no difference whatever in the two cases. What is admissible on behalf of the defendant in ejectment to avoid a *prima facie* case made by the plaintiff would surely be admissible in evidence for the plaintiff as a part of the *prima facie* case which he is

required to establish. The effect of the evidence when admitted has nothing to do with the matter. It may or it may not be conclusive of the question at issue. But if admissible in one situation, as it certainly is under the doctrine of Railroad *v.* Smith, in favor of the defendant, it is surely competent in a situation where it becomes material as a part of the title of the plaintiff.

All this being so upon general principles and as affecting general situations, it follows that the rule of evidence here invoked must be applied to the case at bar unless there are some controlling considerations or reasons which except this case from the general rule. The court below held, in substance, that there were such exceptions and that the evidence was not admissible:

1. Because the action of the Secretary in identifying and patenting as swamp and overflowed other lands in this township and section was an adjudication that the premises in controversy were not swamp and overflowed; and that hence the State could not claim the premises in controversy as inuring to it under the grant of 1850.

2. Because the State, in view of the proceedings had and taken under the grant for the benefit of the St. Mary's Falls Canal is estopped to claim the premises under the swamp grant of 1850.

We submit that neither of these considerations except the present case from the general doctrine which we have above invoked.

(1) *The Question of Identification by the Secretary.*

As to this objection to the admission of the parol evidence the view of the court below, as expressed in the opinion, is that the Secretary of the Interior, under the act of 1850, is a special tribunal authorized to identify the lands passing under the grant; that when he has once discharged that duty, it is an end of the trans-

action and the State is bound by his determination, and that, as applied to the present case the Secretary did fully discharge this duty by from time to time selecting lands in this vicinity as swamp and patenting them to the State. The learned district judge, in defining what he considered a discharge of this duty and the consequent conclusion of the whole matter, speaks of an act of the Secretary, in identifying land, "throughout a State or a comprehensive locality." As it is entirely clear from the record that the Secretary of the Interior has never designated the swamp lands inuring under the grant, "throughout the State," within 1,600,000 acres, and that this immense body of land is still claimed by the State and unsettled by executive determination, it can hardly be possible that any action of the Secretary in respect to the entire limits of the State was in the mind of the court when applying the doctrine of its opinion to the case at bar. We think it will hardly be claimed that the court intended to hold that the Secretary had already adjudicated and settled the entire claim of the State of Michigan under the swamp-land grant, or that because of any such adjudication the plaintiff was not entitled to introduce parol evidence to show the character of the land involved. Should such be the position assumed, it is certainly untenable, viewed from any standpoint or in the light of any consideration of which the case is susceptible. So long as any tract remains within an asserted claim of the State, not finally passed upon by the land department, it certainly can not be said that the identification of lands belonging to her under the grant "throughout the State" has been accomplished, or that the Secretary is *functus officio*. Surely this can not be so with an outstanding claim, under the plats and field-notes, of 1,600,000 acres of land.

Passing from this language of the court, in its definition of the territory in respect to which an adjudication

to be final must extend, the only other description used is comprised within the following words: "A comprehensive locality." Precisely what is intended by this language is not clear, but it is apprehended that the court meant to say that the selection of lands as swamp and overflowed within the township and the section in which the premises in controversy are situated was an identification of lands in "a comprehensive locality."

To properly understand the question here suggested it is necessary to bear in mind that the following are all the facts upon this point found in the record:

(*a*) Other land than the premises in controversy, in the same township and section, were placed on the list of swamp and overflowed lands by the Surveyor-General and were patented to the State under the grant of 1850.

(*b*) But the entire claim of the State is not yet settled or determined to at least the amount of 1,600,000 acres.

(*c*) And no investigation or decision whatever as to the character of the particular forty-acre tract in controversy has ever been had or made by the United States or by any officer thereof except the favorable action of the Surveyor-General in designating the premises as swamp upon the plat retained in his office.

(*d*) There has never been any determination whatever by the Commissioner of the General Land Office or the Secretary of the Interior against the character of this land as swamp and overflowed.

Upon these facts we submit that in respect to the premises in controversy there has never been any identification whatever thereof either as swamp or otherwise by the Commissioner of the General Land Office or the Secretary of the Interior; that the tract is not included within any such identification or adjudication "throughout a State or a comprehensive locality," and that no consideration either of fact or law exists preventing the

State or her grantee from now asserting title to the same as swamp and overflowed land.

The substantial foundation of the position adverse to the plaintiff upon this point is that the correspondence between the Secretary of the Interior on behalf of the United States and the governor of the State of Michigan, and the act of the Michigan legislature of June 28, 1851, constituted a contract under which the State is not at liberty, under any circumstances, to resort to any method of identifying her swamp grant outside of the government-field notes. The superstructure of this position is that under such a contract the premises in controversy have been identified as not swamp and overflowed.

This is not the legal effect of the correspondence in question or the act, or both combined, and no such construction has ever been given to them by any court. On the contrary, the authorities are, and the general if not uniform practice of the department has been, exactly the other way.

Whatever contract exists arises from the letter of the Commissioner to the governor of November 21, 1851 (p. 13, *et seq.*); the reply of the governor, dated December 20, 1851 (pp. 16, 17), and the act of the legislature of June 28, 1851. (Appendix No. 1.)

A reference to these documents shows that no such contract as claimed is fairly deducible from the intent of the parties or the language used. The correspondence, to the contrary, indicates that the intention of the United States was merely to tender the field-notes to the State as a "*basis*" or general rule for determining the character of the land, and that, if the State agreed, the Surveyor General was to "so regard them" (p. 14). The authoritative proposition of the government, made by the Commissioner's letter of November 21, 1850, embraced no

stipulation or provision excluding other evidence or making the field-notes final. It simply offered these field-notes as a substantially fair general body or class of evidence. The proposition itself declares the difficulty of the situation, the meagre character of any existing evidence, and the undoubted right of the State to resort to any testimony attainable. A fair reading of the proposition is that the field-notes should be resorted to merely as a primary source of information.

The letter of the governor (pp. 16, 17), shows a decided disinclination to accept the field-notes for any purpose; a belief that further surveys would increase the grant, and a purpose to submit the matter to the legislature for its action, which purpose was carried into effect, although with what recommendation does not appear from the record.

The act of the legislature, so far as its action upon the proposition of the Secretary is concerned, is embraced in section 1 of the act (Appendix, No. 1), as follows:

"The people of the State of Michigan enact that they *adopt the notes* of the surveys on file in the Surveyor-General's office as the *basis* upon which they will receive the swamp lands granted to the State by act of Congress of September 28, 1850."

It is thus seen that the proposition tendered and accepted was that the field-notes were to be the "*basis*" of the adjustment only, and that no word of contract is found indicating that any further or greater effect was to be given them. To arrive at a correct construction, therefore, of whatever contract existed, it is only necessary to determine, in accordance with elementary principles, what in ordinary and common acceptation is the meaning of the word basis. We say that in this connection it can only mean a primary or original source of information.

Webster defines the word, outside of its mechanical structure use, solely as follows:

"1. The foundation of anything; that on which a thing rests. * * * 3. The ground work; the first and fundamental principle; that which supports. 4. The principal component parts of a thing."

The word, in no possible connection as defined by any lexicographer, or as ordinarily or commonly accepted, embraces any idea of conclusiveness or exclusion or completeness. On the other hand, it necessarily implies a final result, having a fundamental origin or starting point with something more to be added; a structure of some kind erected upon or flowing out of an original or fundamental element or consideration. It is in this sense, and this sense only, that the field-notes were tendered and accepted. The United States said to the State: We have in our possession certain documentary *indicia* which may fairly be resorted to as a fundamental or basic source of information as to the character of the land; you may avail yourself of that evidence if you desire, and we will accept it, but we know it to have been prepared without reference to this question and to be incomplete and inaccurate, and hence we do not offer it as a conclusive test, but as a *basis* and foundation for the investigation which is to result in the identification of your grant. And in this sense the State received and accepted the offer. Neither the United States nor the State understood that it was conclusively bound by this primary fund of evidence, and neither so contracted.

It should be noted in passing that the authoritative offer from the United States is found in the letter of the Commissioner to the governor. The Commissioner, acting on behalf and as the immediate subordinate of the Secretary, was alone authorized to submit a proposition, and the official records, of which the court will take judicial notice (Heath *v.* Wallace, 138 U. S., 573–584), show that

this letter of the Commissioner was submitted to and received the approval of the then Secretary.

Report, Com. Gen. Land Office, 1850, p.—

The letters of the Surveyor-General to the governor are not to be taken or considered as the offer. They were probably never within the knowledge of the Secretary; one letter was marked confidential, and they certainly never received the Secretary's approval. They merely gave the Surveyor-General's own views or construction of the Secretary's letter and hence formed no part of the proposition authoritatively submitted to the State. The proposition in respect to which the State assented is to be found alone in the Commissioner's letter approved by the Secretary.

The contract arising from the letters of the Commissioner and the governor, and the act in question, if such it can be called, is susceptible perhaps of three constructions: first, an agreement that the field-notes as found among the Government archives should be accepted by the United States as final, and should be, so far as the United States was concerned, a conclusive and controlling test in respect to all lands shown thereby to be swamp, with reservation to the State of the right to show, by the usual legal methods, the character of any tract of land not indicated as swamp by the field-notes; second, an agreement to accept the field-notes as an original or primary source of evidence, with a reservation to both the United States and the State of the right to resort to other evidence to show the character of the land wherever the field-notes did not definitely determine the question; third, an agreement to accept the field-notes as the primary or original source of information, with the reserved right in either party to resort to other evidence to show the character of any particular tract, whether embraced in the field-notes or otherwise. Whichever of

these three constructions be extended to the situation, the right of the plaintiff in the case at bar to the use of parol evidence to show the character of the land must be undoubted.

It is certainly clear, under any possible construction of the contract, that so far as the State is concerned, the field-notes were only adopted as one of the methods of identification with reserved right in the State to resort to other evidence, wherever it was necessary to secure to her the full benefit of the grant conferred upon her by the act of Congress.

It follows from these considerations that no contract ever existed which prevents the State on general principles from resorting to extraneous evidence whenever necessary to identify her lands.

We do not deny the general proposition that the Secretary of the Interior was created, by the act of 1850, a special tribunal with jurisdiction to determine the character of the lands to inure to the State under that grant, and that when he has once finally acted upon a particular case, duly and properly presented, his decision is conclusive as a finding of fact. This is undoubtedly the law, no matter whether the field-notes were accepted or not as a basis of adjudication, and no matter what character or class of evidence was submitted to and considered by him. But we do insist that when in respect to a particular tract the Secretary has never so acted; or where he has refused or neglected to so act; or where, from circumstances other than those affecting the character of the land, he is deprived of the power to act, then the State, whether she has accepted the field-notes or otherwise, is entitled, in judicial proceedings, wherever material, to show the character of the land by parol evidence.

This is the exact purport and effect of the decisions of this court already cited upon the question of the general character of the grant, in cases arising in States where the field-notes were not accepted, the principle of law being particularly enunciated and declared in—

French *v.* Fyan, 93 U. S., 173;
Wright *v.* Roseberry, 121 U. S., 509.

Our contention is that this doctrine is equally sound as applied to States where the field-notes were accepted. Such an acceptance, as we have already shown, did not create any contract concluding the State from a resort to parol evidence, but even if it did, and even if it be admitted that the correspondence and the act of the legislature in the case at bar amounted to such a contract, it must still result, under the clear doctrine of the decisions of this court above cited, that if the Secretary under the terms of that contract has neglected to pass upon the character of this land, or is now without jurisdiction to do so for any other reason than considerations arising out of the character of the land, then the State can show its title by parol evidence.

The letter of the Commissioner of November 21, 1850, was sent to all of the states entitled under the act of 1850, and also to Oregon and Minnesota, claiming under the subsequent act of March 12, 1860, extending the act of 1850 to these two last-mentioned States. The states to which this offer was made were Arkansas, Missouri, Iowa, Illinois, Wisconsin, Michigan, Indiana, Ohio, Louisiana, Mississippi, Alabama, Florida, California, Minnesota, and Oregon. Michigan, Minnesota, and Wisconsin accepted the use of the field-notes; most of the other states elected to make their own selections and furnish evidence as to the character of the land; California agreed to neither method, and her claim was the subject of subsequent special legislation. The three states of

Michigan, Minnesota, and Wisconsin were the only ones which accepted the proffered agreement.

The question here particularly under consideration has never, so far as we are advised, been considered or decided by this court or any of the inferior courts in any case arising in the three States, which, as above stated, accepted the government field-notes. But this court has applied the principle to a State which declined the field-notes (French *v.* Fyan, Missouri), and to one which accepted neither plan (Wright *v.* Roseberry, California), and in both of these cases has used plain and unambiguous language, fully applicable to the case at bar, arising in a state which accepted the field-notes. Indeed, in contemplation of any fair construction of the contract, so-called, arising by virtue of the acceptance by the State of the field-notes, there is no possible distinction between the case at bar and those already decided by this court, so far as the doctrine in question is concerned. In all of them the Secretary had neglected or failed to adjudicate by identifying the land one way or the other, and the court in the decided cases said that this admitted the state to the use of parol evidence. It was in all the cases a neglect or failure of the Secretary to discharge this duty, which raised the necessity and admitted the parol evidence, and it makes no difference whatever whether that duty was imposed by the act of 1850 alone or primarily by said act and secondarily by a contract under the act covering a particular question of evidence. His failure to act in either case leaves the state at liberty, when her title arises in the courts, to resort to the best evidence attainable to identify the land.

But although this court, and apparently no inferior court, has heretofore had occasion to pass upon the question in either of the three states mentioned, there can be no doubt as to the position of the land department in

this regard. In respect to all three of these states the Secretary of the Interior has repeatedly held that the field-notes were not final or conclusive, and has firmly established the doctrine, so far at least as the executive is concerned, that parol evidence is admissible to show the character of the land.

In two very early cases (1855–1859, in Wisconsin) a cursory reading might lead to the impression that the Secretary held the field-notes final and conclusive.

Winans *v.* Wis., 2 Lester, 553;
State of Wis., *Ibid.*, 571.

But an examination of these cases will show that in the first mentioned the decision was in favor of the state against a stranger who sought to contradict the field-notes by parol, and that the latter case arose upon an application of the state to recede from its agreement and for re-examination and re-survey of certain lands claimed, and in both of these cases the swampy character of the land was fully established.

However these cases may have been, the later adjudications are all to the contrary and, if necessary, clearly overrule them. Indeed, we have been unable to find a single case decided since 1859 which even inferentially holds the field-notes final.

In Wisconsin, in the following cases, it was held that the field-notes were not final or conclusive; that the United States were not bound even by the finding of a special commission appointed by the concurrent action of the State and the United States for the purpose of identifying swamp land, and hearings were ordered to determine the character of the lands involved.

Wisconsin *v.* Wolf, 8 L. D., 555;
Nita *v.* Wis., 9 *Ib.*, 385.

In the first of these last-cited cases Mr. Secretary Noble, discussing this point, at page 556, said:

"The State is not entitled to lands not granted, nor can the Secretary of the Interior by agreement enlarge its grant. It is his duty to finally determine what lands passed to the State of Wisconsin, as well as to other States, under and by virtue of the swamp-land act; and though he may adopt certain general methods for identifying these lands, yet the adoption of such methods does not deprive him of the right or relieve him of the duty of resorting in certain cases to other and different methods. Nor is the adoption of any such general method of adjustment, though by agreement between the officers of the respective governments, a contract binding on the general government. The Secretary of the Interior, notwithstanding such an agreement, may at his discretion, any time before swamp lands are certified to the State, adopt such methods, resort to such means, and employ such agencies as in his judgment are best calculated to enable him to reach a correct conclusion as to the real character of any particular tract of land claimed under the swamp-land act."

And in the same State (Wisconsin) the Secretary has specifically held that the field-notes were not binding or conclusive upon the State.

Dox *v.* Wisconsin, 10 L. D., 39.

In deciding this last-mentioned case, at page 40, Mr. Secretary Noble, reversing the Commissioner and awarding the land to the State, said:

"If it was intended to be held by your office that the field-notes of survey are conclusive as against the State of Winconsin in respect to the swampy or non-swampy character of the land, this was error."

In Minnesota, in the following cases, the Secretary held the field-notes not binding or conclusive upon the United States.

Lechance *v.* United States, 4 L. D., 479;
Kortsch *v.* Minnesota, 7 *Ibid.*, 313;
Sutton *v.* Minnesota, *Ibid.*, 562.

In deciding the last above-mentioned case, at page 564, Mr. Secretary Vilas said:

"The arrangement early entered into between the Secretary of the Interior and the proper authorities of certain States, as to the credit to be given to the field-notes of survey, was a speedy and inexpensive plan adopted for convenience in the adjustment of swamp-land grants, and one doubtless which would generally prove correct; but it was not in any proper sense a contract between the general Government and the State that such field-notes should be taken in all cases as conclusive evidence of the facts stated therein."

And in Michigan, the Secretary, in the following cases, specifically held that the field-notes were not conclusive; that unless they satisfactorily show the exact character of each of the smallest legal subdivisions a hearing should be ordered to determine the question, and in the last-cited case, that in such a hearing parol evidence was admissible to impeach the accuracy of the survey.

Cushing *v.* Mich., 4 L. D., 415;
Michigan *v.* Erickson, 5 *Ibid.*, 681.

In deciding the first above-cited case, Mr. Secretary Lamar, at page 416, said:

"If the character of the land can not be determined by the survey, the State must show the character of the land by other satisfactory evidence.

* * * * * *

"As the survey furnishes no satisfactory evidence of the character of this land, and the State can not be deprived of it if it is of the character claimed, you are hereby directed to return the record of these several cases to the local office, with instructions to order a hearing to determine the character of these lands at the date of the grant, as near as may be obtained, after notice to all parties, and if it should appear from such examination that the greater part of any subdivision was swamp and unfit for cultivation, such subdivision will inure to the benefit of

the State under the grant, and if the evidence shows that the greater part of any subdivision was not of such character, such subdivision shall be subject to entry."

It is thus observed that in addition to the decisions of this court sustaining the proposition for which we contend, we have here repeated decisions of the Secretary of the Interior, in every one of the states which accepted the field-notes, holding that such acceptance did not operate as a contract making the field-notes binding, but that, in these states, as elsewhere, recourse could be had to parol testimony to determine the fact. As to all of these three States, the field-notes were held not conclusive upon the United States, and as to Wisconsin and Michigan they were expressly held not to be binding upon the state.

Against these authorities we have been unable to find a single case in either the state or federal courts or the department. Every court case reported involving this question sustains the claim for which we are contending, and the departmental authorities, without a break except the two earlier doubtful and in any event overruled cases, are exactly to the same effect. We accordingly confidently submit that no contract arose between the United States and Michigan which made the field-notes binding or conclusive upon the State; that the State of Michigan has at all times been at liberty to go outside the field-notes to identify her lands, if she so desired; and that as the Secretary has failed to identify the premises in question one way or the other, and can not now act in the matter, the State is entitled to identify the land by parol.

It is clear, under the repeated decisions of the Secretary, that the issuance of the certificate to the State for the benefit of the canal company, exhausted his juris-

diction over the land, and that since January 24, 1885, it has been impossible for him legally to act in the premises by identifying the land or passing title to the State. So far as departmental decisions are concerned, this is settled beyond controversy.

Garriques *v.* A. T. & S. F. R. R., 6 L. D., 543;
Wright *v.* California, 8 *Ib.*, 24;
Patrick Daly, *Ib.*, 471;
Iowa R. R. Co. *v.* Sloan, 9 *Ib.*, 597;
California *v.* Boddy, *Ib.*, 636;
Smith *v.* Portage Lake Canal Co., 10 L. D., 475.

And this position seems also to have been taken by this court in the following as well as many other cases which might be cited:

Moore *v.* Robbins, 96 U. S., 530;
Smelting Co. *v.* Kemp, 104 U. S., 636;
Steele *v.* Smelting Co., 106 U., 447.

This relieved the State from any necessity for applying to the department for relief. And the State is not even chargeable with any laches in the premises, for she had no possession of or control over the field-notes, and presumptively no knowledge of their contents, until 1860, long after the certification for the benefit of the canal company. Any application to the department for relief would then have been useless, and would, under the authorities above cited, been denied for want of jurisdiction in the department. All these considerations bring the case within the exact language of Mr. Justice Field in Wright *v.* Roseberry, permitting a resort to parol evidence where the Secretary is under disability to certify the lands to the state "for any cause other than a consideration of their character."

The foregoing considerations and authorities are equally conclusive against the secondary proposition

that under the provisions of a contract making the field-notes final there has been an adjudication by the Secretary that the premises in controversy were not swamp. The proposition against us, in this regard, is simply that, by an adjudication that other lands in this vicinity were swamp, this land was determined to be dry. There is no pretense or suggestion that any question as to the character of this particular tract was ever called to the attention of the Secretary, was ever by him considered, or that any decision or finding, in respect thereto, was ever by him made. The bare proposition is that because he certified other lands in this township and section as swamp, he necessarily determined in respect to the whole of said section and said township that no other swamp lands existed therein.

It seems hardly necessary to argue against such a proposition with any elaboration. It seems upon first blush to be transparently untenable; and reflection only tends to strengthen first impressions in this regard. We submit that it can hardly, with propriety, be said that, in respect to the discharge of a duty placed by law upon the Secretary, that duty is performed in respect to black-acre by making an adjudication as to white-acre.

The act of 1850 required at the hands of the Secretary a complete and not a partial identification of the entire claim of each of the states. That identification must embrace and include all the lands properly inuring under the grant, or the Secretary can not be said to have performed his duty or to be *functus officio*. So long as a claim for 1,600,000 acres, under the field-notes alone, is outstanding and unsettled by any decision of the Secretary, either for or against the State of Michigan, no settlement of the entire claim of the State can possibly be asserted or maintained. The State is still an applicant at the doors of the department for this immense body of

land, which she alleges to have been swamp and overflowed at the date of the swamp grant, and to be so shown by the plats and field-notes of the government surveys. Until the Secretary has adjudicated upon that claim, and upon each and every subdivision embraced within it, there is certainly no final identification of the entire claim of the State.

That entire claim can extend, and of course does extend, to different parts of the State, and enters innumerable townships and probably sections in which the United States has already found and passed to the State title to swamp lands.

The act itself recognizes no political subdivision, nor do the instructions issued under it, nor does the letter of the Commissioner to the governor submitting the proposition for the use of the field-notes, nor does the statute of the State accepting said proposition. In fact, at no place in the entire transaction is there found any suggestion or intimation that an adjudication in respect to lands in a particular vicinity shall conclude all claims of the State in the future to lands in that particular neighborhood. The lists of lands certified to the State and the patents following them were never made with reference to any such political subdivisions.

As matter of fact and in common practice, such certificates and patents include original and repeated supplemental adjustments of lands in the same townships and sections (Admission, Record, p. 26). The necessity for supplemental lists and patents results from the very nature of the case. The field-notes were in the possession and were the property of the government. In making selections of lands the Surveyor-General, in ordinary course of business, necessarily in some instances omitted, as in the case at bar, certain tracts which he should have included in his lists. And for this reason alone, to say nothing of cases where subsequently the character of the

land appeared otherwise than by the notes, subsequent identifications by lists and patents became absolutely necessary in order that the duty of the Secretary might be fully discharged.

Our contention is that the State is entitled to specific and definite action by the Secretary of the Interior in respect to every legal subdivision which she claims inures to her under the grant, and that so long as any claim on the part of the State of this kind remains undecided by the Secretary, full jurisdiction remains to consider and determine in respect to that particular subdivision. In other words, the Secretary is never discharged from the performance of the duty imposed by the act of 1850 until he has finally and conclusively settled every claim of the State to every tract of land which she alleges to be swamp and overflowed.

In this connection the remarks of a late learned Secretary of the Interior and a late learned and highly respected justice of this court, found in a decision made by him as such Secretary, are particularly pertinent and instructive. In deciding the case of the State of Louisiana (5 L. D., 515–519) Mr. Secretary Lamar, speaking upon this very point, says:

"I am not unmindful of the fact that the interests of the Government and of the State require that its claim shall be speedily adjusted. Nearly forty years have passed since the passage of the first-named act, and under said grant many millions of acres were selected by the States, including a large amount of land that was not of the character granted. While it is doubtless true, as stated by counsel in his letter to your office, 'that many lands which have been patented as 'swamp' that are not so in fact were included in the lists confirmed by Congress to the States by the act indicated' (1857), yet, if it be shown satisfactorily that any tracts *have not* been listed which *are* of the character granted, *it is clearly the duty of the Secretary of the Interior to cause such tracts to be listed, and the lists approved without delay.*"

We assert with the utmost confidence that no authority can be found, judicial or executive, wherein it has ever been held that the adjudication to a state of certain lands within prescribed limits as swamp and overflowed was an exclusion of all other lands as swamp. On the contrary, all of the cases which we have hereinbefore cited are exactly to the contrary, either by necessary implication or by direct decision. Such was necessarily the case in each one of the departmental decisions which we have cited and quoted from above. In each of said cases the element of new examination, after previous certification of lands in a particular locality, was present and necessarily determined.

And the decisions of this court go so far as to hold that even an inferential adjudication against the swamp character of land, arising from other disposition of the same by the United States, was not such an identification or exclusion thereof as would prevent the introduction of parol testimony to show the real character of the land and establish the claim of the state. This was so held in respect to subsequent disposition of lands under the pre-emption law, in—

Wright *v.* Roseberry, 121 U. S., 488.

And in respect to subsequent railroad grants made by act of Congress, in—

Railroad Company *v.* Smith, 9 Wallace, 95;
French *v.* Fyan, 93 U. S., 169.

We accordingly, under this head of our brief, confidently submit that no contract ever existed between the State and the United States which limited the State to the field-notes of the Government surveys in identifying her lands; that the State has always been at liberty, and is now at liberty, to resort to extraneous evidence to establish the character of any particular tract in any case where the Secretary has not finally, and in respect to

that particular tract, identified the land as dry; and that in the case at bar no adjudication, either inferentially or otherwise, has ever been made by the Secretary of the Interior in respect to the premises involved.

(2) *The Question of Estoppel.*

The second ground stated by the learned district judge in his opinion is that of an equitable estoppel, defined as follows: "The State selected and received this description under another grant and conveyed it." * * * "The state could not after this had been done be heard to say that it would repudiate its own course and dishonoring its patent claim title under the act of 1850, and resell it to another."

Record, page 12.

It is hardly necessary to enter upon any discussion of the question in what instances a state or sovereignty may be estopped by the acts of its agents or officers, and it will be sufficient for this controversy to call attention to some of the rules which have been laid down in reference to the application of the doctrine of estoppel to title to realty.

The case of Brant *v.* Virginia Coal and Iron Company (93 U. S., p. 326), is directly in point. The court, at page 335, speaking by Mr. Justice Field, say:

"For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury."

And on page 336:

"And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, * * * the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established."

In the case of Lake Superior Ship Canal Railway and Iron Co. *v.* Cunningham (44 Fed. Rep., 819), a case involving exactly the same element of estoppel as is urged in this case, the rules above stated were strictly applied and Mr. Justice Jackson, then sitting as circuit judge, at page 833, after applying the doctrines above stated, also adds a summary of principles stated in the case of Brant *v.* Coal Company, and says:

"To make the doctrine of estoppel apply to title to real estate the party invoking its aid must not only be misled to his hurt, but he must also be destitute of knowledge of the true state of title, *and also of the means of acquiring such knowledge.*"

Has the defendant company brought its defense as presented by the record within the rules above stated? A discussion of this proposition calls for an examination of the legislation which is the basis of defendant's title, and of the various steps taken thereunder in the selection, listing and patenting of the land. This examination involves: (a) the legislation of Congress making the grant and of the State in accepting the same and conferring it upon the canal company; (b) the selection of the lands by the company and the listing of the same to the state; (c) the patenting of the land by the State to the St. Mary's Falls Canal Company; (d) the notice to the State arising from knowledge of the actual character of the land; (e), (f), and (g), general considerations applicable to the situation.

(*a*). The act of August 26, 1852, granted to the State of Michigan 750,000 acres of land, to be selected by agents to be appointed by the State, subject to the approval of the Secretary of the Interior, from any lands within the State, *subject to private entry;* these lands to be at the disposal of the legislature for canal purposes alone.

This act plainly in terms excludes the idea of any in-

tention to pass to the State as trustee for the canal company any of the swamp lands previously granted. The act, indeed, would be construed to exclude such lands, even if there were no express exceptions.

Wilcox *v.* Jackson, 13 Pet., 498;
Dredge *v.* Forsyth, 2 Black, 563;
Maguire *v.* Tyler, 8 Wall., 650;
U. S. *v.* Fitzgerald, 15 Pet., 407;
Rice *v.* R. R. Co., 1 Black, 358.

That this construction is intended by the act, is shown by the fact that it is provided that if the canal be not completed within a certain time, the State is bound to pay to the United States any moneys received from the sale of said lands (but not less than $1.25 per acre) and the unsold lands to revert. This shows clearly that there was no idea of including swamp lands, for Congress can not be charged with the absurdity of requiring, even by implication, the State to account to the United States for any swamp lands it might sell.

Moreover it is quite clear that the act of 1852 did not confer upon the State of Michigan the land grant for the sole benefit and advantage of the State of Michigan. On the contrary, the State of Michigan was a mere agency of the United States by which a great public highway was to be constructed which should be for the benefit of the entire northwest in particular and the commercial interests of the nation in general. The State was in fact a mere trustee, having at its disposal 750,000 acres of the public lands of the United States subject to private entry with which to construct this great public highway, reaping no material advantage to itself in the operation or construction of the canal.

Section 3 of the act of Congress declares:

"The said canal shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the vessels of said

government engaged in the public service, or upon vessels employed by said government in the transportation of any property or troops of the United States."

Under section 5 it is provided that after the State of Michigan has been reimbursed for its advances and expenditures "the said State shall be allowed to tax for the use of said canal only such tolls as shall be sufficient to pay all necessary expenses for the care, charge, and repairs of the same."

The grant, therefore, was far different in character from the swamp grant of 1850, which vested in the State the entire benefits and advantages to be derived from the sale or use of the lands granted, as well as the absolute control of and proprietorship in them.

This grant was accepted by the State of Michigan by an act of its legislature, and by the same act provision was made for the construction of the canal.

Session Laws of Michigan of 1853, p. 48; Appendix, No. 3.

Section 1 refers to the act of Congress and accepts it.

Section 5 of this act enacts: "When and as fast as the lands (*i. e.*, the lands granted by Congress) shall have been selected," etc., the Commissioner shall transmit to the Commissioner of the General Land Office "a true copy of said list," and shall "designate and mark upon the books and plats in his office the said lands as St. Mary canal lands."

Section 6 provides for transferring the title of *said* lands to the canal company.

Section 7: "That said Commissioners shall keep an accurate account of the sales and net proceeds of the *lands granted by said act of Congress*," etc.

Section 9: "For the selection of the *lands granted by Congress as aforesaid, for the construction of said canal*, the governor shall appoint agents in pursuance of said act.

He shall give notice to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections; and he shall appoint such agents from the persons so recommended, if in his judgment suitable and proper persons for that purpose."

It would seem from both the Congressional act making the grant and the State act of 1853 accepting it, that it was at first intended that the State itself should undertake to sell the lands granted by the act of Congress and apply the proceeds to the construction of the canal. And this accounts for the provisions in both acts for an accounting between the State and the United States at stated periods for the sale of the land and other items. But it is quite apparent that at the time of making the contract an entirely different policy was adopted. The contract for the construction of the canal was entered into April 5, 1853, and is found in full in the record at pages 40 and 41. Under this contract the parties contracting for the construction of the canal were upon its completion "to receive patents from the State of Michigan for 750,000 acres of land at $1.25 per acre, to be located under the provisions of the act before mentioned." Thus the consideration for the contract was in short the entire land grant made by Congress.

It is to be noticed that in all of this legislation, and the proceedings had under it leading up to the contract for the construction of the canal, there is no attempt to define the particular descriptions of land which should be conferred upon the contractors or their assigns. On the contrary, the import of all the language in the acts of Congress and of the legislature and of the contract itself is to the effect that the contractors shall receive lands in amount and of the character named in the act of Congress of 1852, namely, "750,000 acres of public lands to

be selected * * * from any lands within said State *subject to private entry.*"

It is quite clear, therefore, that up to this point there was nothing from which the contractors or their assigns could be led to believe that they were to receive any of the swamp lands belonging to the State of Michigan.

(*b*). The next inquiry relates to the manner in which the lands in question were selected for the benefit of the contractors for the canal, and upon such selection were certified to the State by the United States.

The first step was the appointment of an agent by the governor of the State of Michigan for the purpose of making this selection. This appointment was made in pursuance of section 9 of the Michigan act of February 5, 1853, the essential portions of which are quoted above. At some time prior to January 24, 1855 (the date at which the list containing this selection was approved by the Secretary of the Interior; record, page 30), the governor appointed such an agent and selections were made and filed as required by the legislation above recited. It would seem as if no argument were necessary to make clear that it was entirely beyond the power of the governor in making this appointment to confer upon the agent authority to select other lands than those of the character described in the act of Congress, namely, public lands of the United States subject to private entry. Certainly the agent could not receive authority to select swamp lands for this purpose, and if the agent so appointed did select swamp lands he exceeded his authority and his acts were unauthorized and void.

Moreover, the agent so appointed was in fact the agent of the contractors for the canal, and not the agent for the State, although so-called. The State, as already pointed out, had no beneficial interest in the lands whatever.

The governor was required by the act of the legislature to appoint such person as the canal company should nominate, an entirely proper provision when we consider that the sole duty of the State in the premises was to obtain the proper construction of the canal provided for by the act of Congress, and the United States out of its own vast domain paid the consideration for the work performed.

The language in the case of Elmendorff *v.* Carmichael (3 Littell, 476), is particularly appropriate to the facts here presented:

"The grantee, and purchaser, was the active agent. The government acted entirely upon his information and suggestion, for the correctness of which he himself and not the government was responsible. She declared the terms on which she would part with her vacant lands. She pointed out no particular spot to the purchaser. This he was to choose, and this choice was confined to the vacant, and forbidden on the appropriated lands. This choice must be made not only at his peril; but if he choose otherwise, and *induce the Government to grant him appropriated lands by his suggestions to her agents,* he perpetrated all the fraud himself. * * * And if he deceived himself and the government both, it does not lie in his mouth to say that he is a purchaser without notice, and that he has inveigled the government into a contract which he will assert against her for the purpose of imputing fraud or estopping her from her assertion of title."

It should be borne in mind that at the time the canal selection was made and the patent issued to the canal company, May 25, 1855, the State of Michigan was without any memoranda from which it could determine for itself the character of the parcel in controversy, for this data was not in its possession until February 6, 1860 (record, page 18), so that if the lists of selections made by this agent were filed with the Commissioner of the State Land Office, as provided in the 5th section of the Michigan act of February 5, 1853, and the marking then

made upon the books and plats in his office as was required, it certainly can not be inferred that there was by this act any intention on the part of the State to mislead or deceive the canal company or waive any of its rights to the lands, for whatever it did in this respect must be considered as done upon the suggestion of the canal company itself, although nominally the agent of the State.

Moreover the Secretary of the Interior has, by the words of his approval, expressly reserved in the certification any rights of the State in the premises, and thereby given notice to the canal company that they took the lands mentioned in the list subject to such rights. The approval (record, page 30) is made expressly "subject to any valid interfering rights." The lands having been previously appropriated by the act of 1850 as swamp lands, they came within the terms of this reservation. Such words are not meaningless and have been very liberally construed when used in statutes, patents, and otherwise by this court.

Fremont *v.* Railroad Co., 9 Wall., 89;
Railroad Co. *v.* Smith, 9 *Ibid.*, 95;
Sioux City, etc., Land Co. *v.* Griffey, 143 U. S., 32;
Dredge *v.* Forsyth, 2 Black, 563;
Maguire *v.* Tyler, 8 Wall., 650.

In the approval of the land as canal land the State of Michigan was entirely a passive factor, and the only active parties were the canal company itself and the Land Department of the United States, and any act which was done on the part of the State in the matter was done at the suggestion of the officers of the canal company, the recipients of the grant, so that if any fraud or deceit was practiced it was practiced *upon* the State of Michigan and not *by* it. The language of Mr. Justice Jackson, then circuit judge, in the case of Lake Superior Ship Canal Company *v.* Cunningham (44 Fed. Rep., 819), a case precisely,

in all respects, like that at bar, at page 833, is at this point, particularly instructive:

"The canal company was not misled to its injury by any act of the state or its officials. Its own officer acted in violation of his instructions from the governor in selecting said lands. The company knew the lands had been previously granted, was effected with full notice of the public acts of Congress, of the land department, and of the state in relation thereto, and assumed to act for itself in selecting what it could not legally appropriate. The state was guilty of no deception or fraud in leading the company to select said lands."

The St. Mary's Falls Canal Company and its grantee, the defendant in error, among other things must be charged with notice of the provisions of the act of Congress approved August 3, 1854 (10 Stat., p. 346).

This statute is deemed so important in disposing of the question at bar that we here insert it in full as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where lands have been or shall hereafter be granted by any law of Congress to any one of the several States and Territories, and where said law does not convey the fee-simple title of such lands or require patents to be issued therefor, the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

This act declares, beyond any question or legitimate dispute, the exact legal effect of the certification to the

State made under the canal grant. By its clear and unambiguous terms no title whatever to the premises in dispute passed to the State by this certification; the State never had any title to convey to the company; the company never received any title from the State, and no estoppel arising out of the certificate can by any possibility be successfully invoked.

It will be borne in mind that the grant to the State by the act of 1852 was a float, pure and simple; that no title in fee passed by that act to the State; that until selection of the land in the way pointed out, subject to approval of the Secretary of the Interior, the fee remained in the United States. No such selection or approval is shown or suggested anywhere in the record, except as the fact may appear from the copy of the certified list found at page 30. From this list it simply appears that at some time prior to January 24, 1855, the exact date not being shown, the premises were selected by some agent of the State, and that upon said January 24, 1855, they were certified as inuring to the State under the grant of 1852. It will also be borne in mind that the act of 1852, the canal grant, did not require or authorize the issue of patents for any of the lands granted. The only fee-simple title vesting in the State is that shown by this list of 1855. Without that list the defendant has no title whatever with which to meet that of the plaintiff. In other words, the title of the defendant is such and such only as it may have acquired by virtue of and through this certificate. Prior to the act of 1854 no authority whatever existed for giving to the State any evidence whatever of a fee-simple title. The sole authority for giving such evidence in the shape of a certificate was the act of 1854, and no subsequent statute has ever changed the law of the situation in any way. The certificate was made under this act of 1854, some six months after its passage.

We submit that under this certificate, as the same is expressly defined and limited by the act of 1854, the premises in controversy were excluded from the conveyance then made to the State. The statute in question leaves nothing for inference and nothing for construction in regard to what lands shall be taken and considered as passing to the State under such a certificate. It directs in language too plain to be mistaken that the lists shall be regarded as conveying the fee simple only of such lands as are of the character contemplated by the act of Congress making the grant and intended thereby to be granted; and further, that where any lands are embraced in the list which are not of the character contemplated by the act of Congress and are not intended to be granted thereby, the list, so far as these lands are concerned, "shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

If the act in question had been passed with express reference to the case at bar, it could not have been drawn in language more apt and certain to protect the title of the State under the swamp-land grant and to exclude any title in the canal company under the grant of 1852. The premises in controversy, beyond all question, were not of the character contemplated by the grant of 1852, and were not intended to be conveyed thereby. And this for two reasons: first, because they had been previously granted to the State, and hence, under decisions of this court too numerous to mention, would not be embraced in any subsequent grant by Congress, although not expressly excepted therefrom; second, because as matter of fact the premises were swamp and overflowed and hence were not in contemplation of Congress as by any possibility to be embraced in the canal grant. The result is, that so far as these premises are concerned the list in question was "perfectly null and void," and the same conveyed no "right, title, claim, or interest" to the State.

This being so, the patent of the State to the canal company was of no effect or consequence whatever. The patent can have no greater force, viewed from any standpoint, than the certificate upon which it was based. Both were illegal, not voidable only, but absolutely null and void. It follows, of course, that no estoppel can be invoked by the defendant arising out of such a transaction. To invoke the doctrine of estoppel at all, the defendant must be in possession of some legal title enabling it to raise as against the State the right to assert its legal title derived under the swamp-land grant. As a mere stranger the defendant in error can not defend the present suit by saying that something the State has done estops it from setting up a legal title. And here the defendant is in even a worse position than would be a stranger to the paramount source of title. It is setting up legal title under a paper upon its face a conveyance, but one which the law declares to be absolutely null and void and to convey no title whatever.

And in thus, in an action of ejectment, pointing out a defect in the defendant's title, the plaintiff is not relying upon that defect rather than his own title to sustain his case, but on the contrary, is simply meeting an unauthorized assertion of estoppel by showing that the defendant is not entitled to invoke that doctrine at all.

If any claim is set up under the pretence of selection without recourse to or aid from the certificate, the situation of the defendant is not improved. It is still without any legal title whatever as against the legal title produced by the plaintiff. Any selection made was, by the express language of the granting act, subject to approval of the Secretary of the Interior. Without such an approval the defendant has certainly no title which it can assert against the swamp title of the State, and it has no approval unless it can find the same by, through, or under

the certificate in question, and that certificate expressly excludes these lands. And standing alone upon a selection, without the aid of the certificate of the Secretary of the Interior or the patent of the State, it certainly can not invoke against the State the doctrine of estoppel, for except by the mere act of appointing an agent from among persons expressly named by the canal company, the State would have done no act whatever in connection with the title or claim now set up by the defendant in error.

In view of these considerations it is entirely clear that standing upon this act of 1854 alone we can successfully claim that no title to the premises in controversy ever passed to the defendant in error, and that this fact prevents the defendant from invoking the doctrine of estoppel.

It is entirely clear from all the preceding considerations, that in no matter or thing connected with the selection and listing of the land is the State or her grantee now estopped to claim title under the act of 1850.

(*c*). The next step under which the canal title was obtained was the issue of the patent by the governor of Michigan to the canal company, bearing date May 25, 1855, which is set out in full on pages 30, 31, and 32 of the Record.

It is apparent from the recitals in the patent that the sole intention of the executive department of the State was to confer upon the canal company the lands which had been granted by Congress, and which the State had agreed to give the company by its contract entered into April 5, 1853, namely, 750,000 acres of the public land of the United States subject to private entry. Any other reading of the instrument is to render nuga-

tory all of the recitals which it contains. Here for the first time we have set out by particular description by the officers of the State of Michigan the lands which the canal company were to receive in consideration for the construction of the canal. In every other instrument the lands have been described only in general terms, so that in performing the work required to be done it can not be claimed by the canal company that it was induced to perform such work by reason of the grant of any particular lands. That the certification to the State of this particular parcel by the General Land Office was null and void has already been demonstrated. The intention of the governor of Michigan was only to convey lands properly certified; that is to say, lands belonging to the grant, and beyond this he had no power or authority in the premises.

It has been repeatedly and uniformly held by the Supreme Court of the United States that patents for lands which have been previously granted, reserved from sale, or appropriated, are void.

Morton *v.* Nebraska, 21 Wall., 660, 674–5, Ejectment;
Best *v.* Polk, 18 Wall., 112, 117, Ejectment;
Polk *v.* Wendell, 9 Cranch, 87, 99;
Minter *v.* Crommelin, 18 How., 87, 88;
Wright *v.* Roseberry, 121 U. S., 488, 490–519;
U. S. *v.* Stone, 2 Wall., 525–535;
Wilcox *v.* Jackson, 13 Pet., 498;
Stoddard *v.* Chambers, 2 How., 284–318;
Easton *v.* Salisbury, 21 How., 426;
Reichart *v.* Phelps, 6 Wall., 160.

The executive officers have no power to issue a patent in such cases, and this want of power may be proved in an action at law by extrinsic evidence, either record, documentary, or oral.

Morton *v.* Nebraska, *supra;*
Minter *v.* Crommelin, *supra;*
Best *v.* Polk, *supra;*
Wright *v.* Roseberry, 121 U. S., 488–519;
Sherman *v.* Buick, 93 U. S., 209;
Doolan *v.* Carr, 125 U. S., 618;
Smelting Co. *v.* Kemp, 104 U. S., 636–641;
Patterson *v.* Winn, 11 Wheat., 380.

Mistakes and illegal acts of ministerial officers can neither benefit one party nor prejudice the rights of the other. Acts of officers in violation of law and contrary to duties of office are void.

Brown *v.* Clements, 3 How., 650, 653, 665–668.

The Michigan act of February 5, 1853, certainly gave the governor no authority to convey any other lands than such as were described in the act itself, and it may be stated as a general proposition that the governor possessed no powers in this behalf other than those conferred upon him by general or special enactments. There are certainly no such general statutes of the State of Michigan as would authorize the governor, of his own motion, to convey swamp lands to the defendant. The disposition and control of the swamp lands were entirely within the province of the commissioner of the State land office, and he could make sales of them only under certain restrictions. And a sale not made in accordance with the law would be void.

Title 5227, sec. 11, Howell's Annotated Statutes of Michigan, prescribing the duties of the Commissioner of the State land office, is as follows:

"The said commissioner shall have the general charge and supervision of all lands belonging to the State, or which may hereafter become its property, and also of all lands in which the State has an interest, or which are or may be held in trust by the State for any purpose men-

tioned in this title, and may superintend, lease, sell, and dispose of the same in such manner *as shall be directed by law.*"

And title 5316, sec. 56, is as follows:

"In case of any sale made *by mistake, or not in accordance with law*, or obtained by fraud, *the same shall be void*; and no certificate of purchase issued thereon shall be of any effect, but the holder of any such certificate shall be required to surrender the same to the commissioner, who shall thereupon refund the amount paid in the like funds received by him on such certificate."

All of these matters have been specially passed upon by the Supreme Court of the State in the following cases:

Attorney-General *v.* Smith, 31 Mich., 359;
Attorney-General *v.* Thomas, 31 *Ibid.*, 365;
Hadley *v.* Leonard, 35 *Ibid.*, 71.

Unauthorized acts of the governor in attempting to pass title to lands even when confirmed by an act of the legislature create no estoppel as against the State or parties claiming under it.

Fenn *v.* Kinsey, 45 Mich., 446.

This case was ejectment. Fenn sued to recover lands selected and set apart to aid a road from Owosso to Grand Haven, under the Congressional act of June 3, 1856. Fenn claimed by a conveyance from one Bowes, who claimed under grant from the Port Huron and Lake Michigan Railroad Company, to which the land had been granted by the State Board of Control and the Governor in 1873. This action of the Board and Governor the court had held unlawful in Bowes *v.* Haywood, 35 Michigan, 241. The lands were subject, in 1857, to appropriation by the Board of Control to parties competent to build a railroad to Owosso from Grand Haven, the Detroit and Milwaukee company upon whom the grant was conferred by the State act of 1857 having failed to accept the

grant. The Board of Control conferred the grant, in August, 1857, upon certain parties who never took steps to carry out the work, and subsequently released their claims to the State. In 1871 the Board of Control resolved that it would be proper to transfer the grant to the Port Huron and Lake Michigan Company. In 1873 a further resolution was passed releasing the grant from Grand Haven to Flint and thence to Port Huron to this company; and May 3, 1873, the governor, acting under this resolution, patented the lands to the company. All this time the railroad company had not built the road west of Owosso, nor intended to do so, and had, in fact, built nothing west of Flint. The company at once deeded to Bowes under a trust deed. In 1877 the legislature of Michigan passed an act ratifying and confirming the acts of the governor and board of control. March 3, 1879, Congress released to the State of Michigan the reversionary interest of the United States in all of these lands in this portion of the grant covered by the act of June 3, 1856. It was claimed on the part of the plaintiff that this title, although void in its creation, was made good by this confirmation, and in effect that the State was estopped to assert its claim under the act of Congress of March 3, 1879. Upon this point the court say:

"At the time when the act of 1877 was passed, it is beyond question that the State was bound by the terms of the Congressional grant, which were formerly accepted by the law of 1857, to dispose of none of these lands except for the specific purposes named in the act of Congress. As the United States reserved a right to all lands not legally disposed of under the trust, and, under the grant, the State itself had no power to divert them, the act of 1877 was in direct violation of that clause of the Constitution of the United States, which declares that no State shall pass any law violating the obligation of contracts. To hold that such a law operated by way of estoppel would be in effect to destroy the weight of the

constitutional provision. The only proper way to construe void legislation is to treat it as absolutely void until the legislative power, after obtaining authority to do so, sees fit to re-enact it. Congress did not attempt to bind the State to carry out its illegal action, and could not have done so. Any State legislature, after 1879, had a right to treat that legislation as if it never had been passed, and a mere release from the obligation of the original contract by Congress could not operate to ratify the illegal action of the State legislature. It is for the State itself, now that it has plenary power, to act as if there had been nothing done before."

No other rule could be tolerated. The State is the owner and holder in trust of lands, and the legislature authorizes the sale or disposal thereof in various ways. Some are reserved from sale before being subject to private entry; others must be sold at particular prices. Some are held in trust for school, university, and other purposes. Yet all these lands are under the care of the commissioner of the State land office, and patents may lawfully be issued, granting and conveying such lands. But the executive officers of the State can not, because they possess the power to convey these lands by patent, disregard the laws through which they derive their authority and issue patents in violation thereof.

All the laws governing the executive departments are supposed to be known by the persons dealing with those departments, and all the records upon which they base their action are public records, open to inspection. This being so, the only way in which the interests of the State can be protected from ignorance, carelessness, or corruption in its officers, is to require persons dealing with public officers to see at their peril that the acts of these officers are *not ultra vires.*

Bigelow on Estoppel, 300–1, note;
Lake Shore R. R. *v.* People, 46 Mich., 209;
Atty. Genl. *v.* Marr, 55 Mich., 446;
Hart *v.* U. S., 95 U. S., 316;
Wright *v.* Roseberry, 121 U. S., 488, 519, 520.

Certainly it needs no argument or citation of authorities to establish the proposition that a patent by the sovereignty, containing recitals such as are contained in the patent in question here, does not operate as a warranty on the part of the sovereignty.

As to the St. Mary's Falls Canal Company, the grantee named in the patent, these recitals must be considered as made at its suggestion.

Carver *v.* Jackson, 4 Pet., 1–87.

As to the defendant in this case and other subsequent holders to the canal company, they were chargeable with notice or knowledge of the facts which a reasonable and prudent examination of the recitals would have disclosed to them.

Cambridge Valley Bank *v.* Delano, 48 New York, 326, 336;
3d Washburn on Real Property, p. 94, third ed.;
Scott *v.* Douglas, 7 Ohio, 227;
Douglas *v.* Scott, 5 Ohio, 194, 198;
Thayer *v.* Wendell, 1 Gall., C. C., U. S., 37;
Day *v.* Brown, 2 Ohio, 347:
Manifee *v.* Morrison, 1 Dana (Ky.), 208;
Nicholas *v.* Jones, 3 A. K. Marsh (Ky.), 385;
Wright *v.* DeGroff, 14 Mich., 168;
Glenn *v.* Allison, 58 Maryland, 527;
Sip *v.* Launback, 2 Harris, N. J., 442;
Crane *v.* Morris, 6 Pet., 598.

As in respect to the selection and listing of the land, so here, also, in respect to the patent of the State, no estoppel can be successfully invoked.

(*d*). The canal company and other occupants of the land, including this defendant, are chargeable with notice of the actual character of the land itself, and hence can not invoke the doctrine of estoppel. It must be

presumed that the agent of the canal company in selecting this land had knowledge of its condition.

In the case of Nall *v.* California (2 Copp's Public Land Laws, p. 1048), Secretary Schurz holds:

"The act of September 28, 1850, was notice to the world that all of the swampy lands in California were thereby granted *in præsenti* to the State, and were not subject to pre-emption entry or sale thereafter; and the person who filed a declaratory statement on lands actually swampy, does so with full notice that they are not public lands, and that he can not obtain any right thereby."

This opinion of the Secretary is cited with approval in Wright *v.* Roseberry (121 U. S., 408), and the court in that opinion still further emphasized the doctrine on page 521, where it says:

"If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlers. The were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the State, and after the segregation map was deposited with the Surveyor-General of the State, with notice also that they were actually segregated and claimed by the State as such lands."

(*e*). In respect to this question of estoppel there is no distinction whatever between the case at bar and two decisions of this court already cited upon other points. In both of these cases the State and her grantee were estopped to assert the title which was sustained by the court, if the claim of estoppel here preferred is well founded.

In Railroad Company *v.* Smith, 9 Wall., 95, the plaintiff, The Hannibal and St. Joseph Railroad Company, claimed under a grant made by Congress, June 10, 1852,

to the State of Missouri, and by the State, by act of her legislature, conveyed to said company. The defendant, Smith, claimed under the swamp grant of 1850, by mesne conveyances from the State. Now, if the plaintiff in the case at bar is estopped by the deed to the canal company, then Smith, in the cited case, was estopped, as privy of the State, by the grant of the State to the railroad company. The swamp title of Smith, if the contention of our adversaries be correct, could not have been successfully relied upon in view of an estoppel flowing from a conveyance by legislative grant to the railroad company. But this court held otherwise and sustained the swamp title. This was necessarily a decision that the facts appearing did not create an estoppel.

In French *v.* Fyan (93 U. S., 169) the same state of fact appeared. The plaintiff claimed under the same railroad grant made by Congress to the State of Missouri. The premises had been conveyed by the State to the railroad company by the legislative grant of 1852, and twenty years later—in 1872—the company conveyed to the plaintiff. The defendant, as in the other case, claimed under the swamp grant. The same element of estoppel existed and arose in favor of a *bona fide* purchaser three degrees removed from the original source of title, if indeed any such doctrine is ever applicable to such a situation. But the court upheld the swamp title, as in the preceding case, and thus necessarily decided that no estoppel arose upon such a condition of fact.

We have thus two decisions of this court fully sustaining our proposition that the patent of the State of Michigan to the canal company for the premises in controversy did not create any estoppel preventing the plaintiff in the case at bar from asserting the title of the State under the act of 1850.

(*f*). If no title passed to the state under the act of August 3, 1854, as we have already shown, then it conclusively follows that there can be no *bona fide* purchaser, who, as such, can invoke the doctrine of estoppel. There can be no such thing as a *bona fide* purchaser of a void title. The same principle applies as in the case of the purchaser of a title emanating from the government and running to a fictitious person, with a deed from such fictitious person to a third party, in respect to which situation this court has decided that there can be no such thing as a *bona fide* purchaser.

Moffatt *v.* United States, 112 U. S., 24.

(*g*). In this somewhat detailed and lengthy examination of the facts bearing upon the estoppel urged by the learned district judge, it has been intended here to point out as clearly as possible the reasons why the State is not estopped, and demonstrate that the State has done no act in connection with the selection and patenting of the lands which can be construed into a fraud, constructive or actual, on its part by which the canal company and its assigns have been misled or deceived to their injury; and on the contrary, to show to the court that if there be any fraud in connection with the transaction, it was a fraud perpetrated upon the State by the agents of the canal company, and that said company had actual notice at every step of its rights in the premises, or had within its power the means of ascertaining those rights had it used due prudence and diligence.

In relying upon matters pointed out it is conceived that the plaintiffs are not infringing the rule that in ejectment they must rely upon their own title. The defendants have sought to fasten an estoppel on the plaintiff by alleging certain acts on the part of the State, its grantor, upon which a want of title in the plaintiff would be shown, and the endeavor on our part has been to show

that such acts were either not performed by the State and were in fact acts of the canal company through whom the defendant claims, or are not such acts as have led to the injury of the canal company.

In conclusion we invite attention to the fact that no equity even can be urged against the state. She was entitled under the act of 1850 to pecuniary benefits arising from the grant. She did not, under that grant, take the lands embraced as a mere trustee for a resulting benefit to the entire people of the country. On the contrary, she owned the grant, to do with it as she pleased and to utilize it for her pecuniary benefit. She was under obligation, it is true, to reclaim the swamp lands within her borders, but that is only an additional reason why, by sale or otherwise, she should be entitled to the benefit and should receive every acre of land granted to her. She should be entitled to consideration in making every acre of that land available and of pecuniary benefit. On the contrary, under the subsequent canal grant, she was nothing but a bare trustee, receiving no pecuniary benefit whatever and interested in no way except as a part of the general community in the opening of a great highway for commerce through about one mile of her territory. She could not even charge tolls, after the canal was completed, except so far as necessary to keep the canal in repair. She was no more directly interested than was Wisconsin, Illinois, or Indiana, and probably not so much so as Ohio, Pennsylvania, and New York. Under such circumstances she merits no criticism for insisting upon her title under the swamp grant as against this canal title, attaching to lands not included in the canal grant and taken by the agents of the canal company illegally and in fraud of her rights. Had the State advisedly and legally passed title to the canal company for land

included within the canal grant, with knowledge of her prior claim under the grant of 1850, the case might be different. But no such facts here appear or exist. The land here involved was not included within the canal grant, the state had no knowledge of its real title and her conveyance to the canal company was obtained by violation of law on the part of the canal agents and by suppression of facts which, had they appeared, would have resulted in the certification and patenting of the premises in controversy to the State as swamp and overflowed land.

So, too, the canal company or its grantee loses no land by the legal recognition of this title of the state. The agent of the canal company will be entitled to select other land to make its full quantity. The application of the plain law to the facts will simply recognize the clear legal title of the state to land which undoubtedly passed to her under the swamp grant and compel the canal company to take other lands to which she was and is now entitled. Many such lands still remain in the state subject to selection. And in this connection it is to be noted that the act of Congress of March 3, 1889 (25 Stat., 854), withdrawing lands from private entry in no way abridges or interferes with the right of the company to thus fill its grant. The act simply declares that no lands, except in the state of Missouri, shall thereafter "be subject to private entry." The selection of a new forty-acre tract by the company would not be subjecting the land to, or taking the land at, "private entry." The words "subject to private entry" in the canal grant are words of description applicable to all lands of that character at the date of the grant. Any lands then falling within the

description can be taken notwithstanding Congress may have subsequently withdrawn them from disposition to cash purchasers. Indeed, the grant of 1852 was a contract which Congress could not have abridged, had it so intended.

We submit upon the whole case that the judgment of the court below should be reversed and the cause remanded for a new trial.

FRANK E. ROBSON,
JAMES K. REDINGTON,
J. M. WILSON,
*Attorneys for Plaintiff in Error.*

## Appendix No. 1.

An act to provide for the sale and reclaiming of swamp lands granted to the State and for the diposition of the proceeds.

SECTION 1. *The people of the State of Michigan enact,* That they adopt the notes of the surveys on file in the Surveyor-General's office as the basis upon which they will receive the swamp lands granted to the State by act of Congress of September 28, 1850.

SEC. 2. The minimum price of said lands shall be seventy-five cents per acre, and shall not be sold for less. All the moneys received from the sale of said lands shall be and remain a fund for the purpose of reclaiming said lands in conformity to the provisions of the grant.

SEC. 3. The commissioner of the State land office shall have the control and supervision of said lands and of the sale thereof, and shall, as soon as the title vests in the State, cause the same to be sold at public auction, at such times and in such quantities as he may think proper, and shall cause thirty days notice of the time and place of sale to be published in all the counties of the State in which there is a newspaper published. After the public sale under said notice the residue of said lands may be sold in the manner now provided by law for the sale of primary school lands as near as may be, except as herein otherwise provided.

SEC. 4. On the sale of any of the said swamp lands, the commissioner shall make out and deliver to the purchaser thereof a certificate, containing a description of the same, the amount paid therefor, the date of the sale, and the name of the purchaser, and setting forth that upon presentation thereof at the office of the Secretary of State the purchaser shall be entitled to a patent, to be executed by the governor, for the lands therein described.

SEC. 5. All moneys accruing to said fund from the sale of the lands aforesaid shall be loaned to the State, and the interest arising from the same shall be paid by the State and become part of the fund aforesaid.

SEC. 6. Said lands shall only be sold in the same legal subdivisions in which they shall be received by the State, nor shall any of said lands be subject to private entry until the same shall have been offered for sale at public auction, as herein above provided.

SEC. 7. The commissioner of the land office is hereby authorized to procure all necessary books, maps, or plats of such lands as may be required for the speedy and systematic transaction of the business of the office, and all proper charges for the same shall be paid out of the fund aforesaid.

SEC. 8. This act shall take effect immediately.

Approved June 28, 1851.

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## Appendix No. 2.

An act for the appropriation of swamp lands to the counties of Houghton and Keweenaw for the construction of the mineral range State road.

SECTION 1. *The people of the State of Michigan enact,* That for the purpose of securing the completion of the mineral range State road from Point Keweenaw (to the village of Copper Harbor, in the county of Keweenaw), thence to the village of Houghton, in Houghton County, thence to the eastern boundary line of Ontonagon County, there shall be and hereby is appropriated to the counties of Houghton and Keweenaw, through which said road passes, 1,280 acres of swamp lands per each mile on said road, to be expended under the authority and by the direction of the board of supervisors of said counties respectively. The patents for so much of said lands on said road passing through the county of Houghton to be issued

to said county, and the patents for so much of said lands on said road passing through the county of Keweenaw to be issued to said county, on the satisfactory completion of said road, as hereinafter specified.

SEC. 2. The board of supervisors of the respective counties aforesaid are hereby authorized to cause all necessary surveys of said road through their respective counties, and to re-locate any part of the same on the most feasible route on said mineral range, and for such purpose to appoint all necessary surveyors therefor, subject to their direction; and said board of supervisors are hereby authorized to advertise for proposals for the building of said road through their respective counties, in sections or otherwise, as they may determine, and to contract for building the same with the lowest responsible bidder furnishing good security, as hereinafter provided; such notice shall contain the length of road proposed to be let, the manner of its construction, the time in which the same shall be completed, and the terms of payment, which notice shall be published not less than three weeks in some newspaper printed and published in the counties aforesaid, or if no newspaper is printed in the county, then in a newspaper printed in the county the nearest thereto, and printed notices shall be posted in all the most public places in said county. All bids made in pursuance thereof shall be accompanied with the names of two persons as sureties for the faithful performance of said work, and said sureties shall be approved by the respective boards of supervisors of the respective counties aforesaid, and they shall enter into bonds guaranteeing the faithful performance of such work specified in such contract let on said bid in such manner as said board of supervisors shall respectively determine. The said boards of supervisors, respectively, are hereby authorized to allow and audit all claims accruing on such contract, or contracts, for work done in pursuance thereof on said

road, and to cause to be kept, by the clerks of their respective counties, an account of the expenses and disbursements on account of said road, in such manner as they may determine, and shall, at the end of each fiscal year, cause a report to be made and published of their doings in relation to said road.

SEC. 3. That whenever any ten consecutive miles of said road shall be completed and approved of by the board of supervisors of the county in which said road shall have been built, and such approval certified to by the chairman of such board of supervisors, the clerk thereof shall serve notice of such approval on the commissioner of the State land office, who shall issue patents to the county in which said work shall have been so completed, conveying to said county twenty sections of said swamp lands, to be selected by such board of supervisors.

SEC. 4. That there shall be withheld from sale not exceeding 1,280 (acres) of the swamp lands in the Upper Peninsula (not otherwise appropriated), for each mile of said road, from and after the time said counties, through which said road runs shall notify the commissioner of the State land office of the selection of the same, and said lands shall so be withheld from sale for the period of four years from the passage of this act.

SEC. 5. Said road shall be completed within four years from the passage of this act.

SEC. 6. That the counties of Houghton and Keweenaw are hereby authorized to raise by tax on the taxable property of said counties such sums of money as the boards of supervisors of the respective counties (may recommend for the purpose of the construction of said road through their respective counties) aforesaid: *Provided*, That before any such tax shall be so levied, said boards of supervisors, respectively, shall submit to the qualified electors of their respective counties, at the next

annual township meeting, the question of said proposed tax.

SEC. 7. That at such election there shall be prepared tickets, printed or written (or partly printed and partly written), and those voting for the tax will have written or printed on their tickets the words "Tax for the construction of the mineral range State road, Yes." Those voting against the tax will have written or printed thereon "Tax for the construction of the mineral range State road, No." Said votes shall be canvassed and returned, as near as may be, as is now provided by law for the canvas and return of votes cast for county officers; and if a majority of said votes cast at said election be in favor of such tax, then the respective boards of supervisors are hereby authorized to levy said tax in one year, or apportion the same so as to raise part in each of the three or four years.

SEC. 8. The clerks of Houghton and Keweenaw counties shall notify the sheriff of their respective counties of the above election, and said sheriffs shall notify the several township clerks in their counties of the said election, and the said township clerks shall give the same notice of said election as is required to be given at special township meetings, stating that said tax is to be voted for: *Provided*, That if from any cause the proper notice of said election can not be given as is required by this act, then it shall be lawful for the boards of supervisors of the above counties to call a special township meeting in said counties by giving the proper notice required to be given for special township meetings.

SEC. 9. Whenever the said road shall be completed in either or both of said counties, and the fact certified to as provided in section 3 of this act, then the commissioner of the State land office shall issue patents to the proper county for the amount of swamp lands appropriated for the construction of said road in said counties.

The lands so patented shall be under the control of the respective boards of supervisors, who shall fix the minimum price per acre, the manner of the sale, and authorize the county clerks to issue patents of said lands to any person or persons who shall pay to the county treasurer the amount of money due for any of said lands.

SEC. 10. Should a majority of the electors vote against the tax, as is provided for in this act, then the board of supervisors of the respective counties of Houghton and Keweenaw shall have the same authority and perform the same duties upon that part of the mineral range State road that is within their respective counties as is conferred upon the board of supervisors of Houghton County in "An act to authorize the board of supervisors of Houghton County to draw certain swamp-land money and to expend the same on the L'Anse State line State road, and for other purposes."

[SEC. 11. This act shall take immediate effect.]

Approved March 20, 1863.

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## Appendix No. 3.

An act to provide for the construction of a ship canal around the Falls of St. Mary.

SECTION 1. *The people of the State of Michigan enact,* That the act of Congress entitled, "An act granting to the State of Michigan the right of way, and a donation of public land, for the construction of a ship canal around the Falls of St. Mary, in said State," approved August 26, 1852, is hereby accepted, and all conditions expressed in said act are hereby agreed to and made obligatory upon the State of Michigan.

SEC. 2. For the purpose of carrying out the objects of this act, the governor is hereby authorized, by and with the advice and consent of the Senate, to appoint five

commissioners and an engineer, who shall prepare a plan for the construction of said canal, in conformity with the provisions of said act of Congress and this act, to be approved by the governor, and who shall have the entire and absolute control and supervision of the construction of said canal; and said commissioners are authorized and empowered to make all necessary contracts for the construction of the same; and during said construction, if at any time said commissioners shall be dissatisfied with the manner of construction or the materials used, it shall be competent for them or a majority of them to direct the contractor to construct the same in such other manner, and to use such other materials, as to such commissioners or a majority of them, or engineer, shall seem necessary to insure a permanent and durable work; and this condition shall be embodied in any contract made for construction of said canal. In case any controversy shall arise between the commissioners and contractor or contractors, in regard to said materials or the manner of doing said work, during the construction of said canal, the same shall be decided by a board, to consist of said engineer and the governor of this State and the district judge of the Upper Peninsula, who shall decide thereon in a summary manner, and the decision of a majority of them shall be binding and conclusive upon the contractors, who shall thereupon proceed with the work in the manner, and make use therein of the materials, as required by said board or a majority of them: *Provided, however*, That the work upon said canal shall not be suspended or delayed by reason of said controversy, and the contractors shall proceed therewith as required by said commissioners. The locks in said canal shall not be less than three hundred and fifty feet long, and not less than seventy feet wide: *Provided*, That all appointments made by virtue of this act shall cease and determine when said canal is completed.

SEC. 3. The said commissioners shall receive proposals for the construction of said canal agreeably to said plan; and in deciding upon said proposals are required to take into consideration the responsibility of the person or persons offering to contract for the same, and his or their ability to carry into effect the object and intention of said act of Congress, by constructing said canal in the best and most expeditious manner; and said commissioners, in making said contract, shall require good and ample security for the performance thereof. Neither the commissioners or governor or the engineer, or any member of this legislature, or any person related to the commissioners or engineer, shall in any manner be interested in the contract, directly or indirectly, for the construction of said canal.

SEC. 4. No contract for the construction of said canal shall take effect until it shall have been approved by the governor and engineer.

SEC. 5. The contractor or contractors for the construction of said canal shall defray the entire cost of surveying, locating, and constructing the same; the necessary traveling and other expenses of the commissioners; the salary of the engineer and assistants. The necessary expense of the commissioners shall be paid out of the State treasury, upon the warrant of the auditor-general. The engineer shall have power, with the approval of said commissioners, to employ such assistants as may be necessary and proper. The assistants shall receive such reasonable compensation for their services as may be agreed upon by said commissioners, and the engineer and assistants shall be paid out of the State Treasury, from time to time, upon the account of each respectively being certified to be correct by said commissioners, and upon the warrant of the auditor-general. The cost of locating the said canal, and all expenses of every kind incidental to the supervision of the construction and

completion of said canal, shall be reimbursed by the contractors as fast as ascertained, and shall be paid by them into the State Treasury and under the direction of said commissioners. When, and as fast as the lands shall have been selected and located, an accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the State land office, whose duty it shall be to transmit to the Commissioner of the General Land Office a true copy of said list, and to designate and mark upon the books and plats in his office the said lands as St. Mary's canal lands.

SEC. 6. The commissioners shall require said canal to be constructed and completed within two years from making the contract, and on the completion of the same, within said period, to their satisfaction and acceptance, and the satisfaction of the governor and engineer, they shall cause a certificate thereof to be signed by the commissioners, governor, and engineer, and filed in the office of the commissioner of the State land office. Thereupon it shall be the duty of the said commissioner of the State land office forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for the construction of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided, which certificates shall run to such persons, and for such portions of said lands so selected and to be conveyed, as the contractor may designate, and shall forthwith be delivered to the Secretary of State, and patents shall immediately be issued thereon, as in other cases.

SEC. 7. That said commissioners shall keep an accurate account of the sales and net proceeds of the lands granted by said act of Congress, and all expenditures in the construction of said canal and the earning thereof, and on or before the first Monday in October in each year, re-

turn a statement thereof to the governor, whose duty it shall be to return the same, or a copy thereof, to the Secretary of the Interior, at Washington, as required by said act of Congress.

SEC. 8. Said commissioners shall be subject to removal for cause by the governor; and if a vacancy shall occur by removal or otherwise, when the legislature is not in session, the governor may fill such vacancy, and the person so appointed shall hold his office until the legislature meet.

SEC. 9. For the selection of the lands granted by Congress, as aforesaid, for the construction of said canal, the governor shall appoint agents, in pursuance of said act. He shall give notice to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections; and he shall appoint such agents from the persons so recommended, if, in his judgment, suitable and proper persons for that purpose.

SEC. 10. That such contractor is by this act empowered and authorized to associate with himself in the obligations, agreements, and conditions of said contract, such persons or parties as he may elect, and assign to them such proportional interest in the remunerations of lands, or the avails thereof, as he may decide and agree upon; or he may assign his rights, privileges and remunerations under the contract with the State to any association organized according to the laws of this or any other State; and upon due notice to the board of commissioners and governor they shall be made parties to the obligations and emoluments of the contract, and be authorized upon such assignment and notice to hold and sell lands, and improve and use the same as they may see fit and desirable, to the same extent that the contractor might individually have done; but in no case shall himself or his sureties be eased or exempted from their

full liabilities to forfeiture for non-fulfillment of the contract as before specified in failure or inadequacy of additional security offered by assignees: *Provided*, It shall not be lawful for said company to use their funds, or any part thereof, in any banking or brokerage, or in buying or selling bank notes or bills of exchange, or in any other business whatever, except that specially provided for by this act and the acts referred to herein.

SEC. 11. The said commissioners, in entering into the contract for the construction of said canal, shall provide that the railroad at present existing across the Portage be in no way unnecessarily interrupted during the progress of the work; and said commissioners shall have power to decide the necessity of any interruption; and the said commissioners may, at the expense of the said railroad company, re-locate said railroad, if they shall deem it necessary, to aid and promote the construction of said canal.

This act shall take effect immediately.

Approved February 5, 1853.

149 US 79

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# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1892.**

TERM NO., 202.

JOSEPH H. CHANDLER, PLAINTIFF IN ERROR,

vs.

THE CALUMET AND HECLA MINING COMPANY,
DEFENDANT IN ERROR.

*In Error to the Circuit Court of the United States for the Western District of Michigan.*

STATEMENT OF CASE AND ARGUMENT OF ASHLEY POND, OF COUNSEL FOR DEFENDANT IN ERROR.

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STATEMENT OF CASE AND ARGUMENT OF ASHLEY POND, OF COUNSEL FOR DEFENDANT IN ERROR.

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### STATEMENT OF CASE.

The action below was ejectment, plaintiff in error vs. defendant in error. After both parties had introduced evidence and rested, the jury, under the instruction of the Court to do so, rendered a verdict for the defendant, and judgment having been entered thereon, plaintiff sued out this writ of error.

A bill of exceptions, which purports to contain all the evidence, constitutes a part of the record.

The controversy is as to the ownership of forty acres of land situated in Houghton County, Michigan, and described as the southeast quarter of the northwest quarter of section twenty-three, in township fifty-six, north of range thirty-three west.

Plaintiff claims title under a patent from the State of Michigan to himself, dated November 3, 1887, and contends that the title vested in said State by the act of Congress of September 28, 1850, which granted to the then several states all the lands within their respective

limits, swamp and overflowed, and rendered thereby unfit for cultivation. The following is a copy of said act:

*An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits.*

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, that to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted to said State.

SEC. 2. *And be it further enacted*, that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the Governor of the State of Arkansas, and at the request of said Governor cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof: *Provided, however*, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively as far as necessary to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, that in making out a list and plats of the land aforesaid all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted*, that the provisions of this act be extended to and their benefits be conferred upon each of the other states of the Union in which such swamp and overflowed lands known as designated as aforesaid may be situated.

Approved September 28, 1850.

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The land in controversy was never listed or patented to the State, as enuring to it under the said act, although a large amount of lands in the same township was so listed and patented.

The evidence, upon which the plaintiff's contention that the title to said lands so vested in the State is based, is hereinafter stated.

Defendant traces title from a patent from the State of Michigan to the St. Mary's Falls Ship Canal Company, dated May 25, 1855, which recites as follows, to wit:

(1) That by act of Congress approved August 26, 1852, seven hundred and fifty thousand acres of land were granted to the State for the construction of a ship canal around the falls of Sault Ste Mary in said State.

**See Appendix hereto for a copy of this act.**

(2) That by acts of the Legislature of said State mentioned, the Governor was authorized to appoint commissioners to let the building of said canal and agents to select the lands so granted.

(3) That the Governor, in pursuance of said acts, did so appoint commissioners to let such contract and also agents to select said land, and that said commissioners entered into a contract with certain persons named for the building of said canal for the consideration of the said grant of land, with a remission of taxes thereon for a period stated.

(4) That said contractors assigned all their rights, privileges and remuneration under said contract to the said St. Mary's Falls Ship Canal Company, and authorized said Company to receive a conveyance of said lands.

(5) That the said lands have been selected and approved to the State according to law, as appears by the list thereof on file in the office of the Commissioner of the State Land Office.

(6) That said canal has been constructed and completed according to said contract, whereby the said St. Mary's Falls Ship Canal Company has become entitled to the aforesaid grant of lands as aforesaid.

And these recitals are followed by a conveyance of lands described, including the land in controversy.

See, for copy of patent, Record pp. 30–32.
See also, for the contract mentioned, Record pp. 40–42.

## ARGUMENT.

### I.

Upon this state of facts, as to which there can be and is no controversy, it would seem to an ordinary mind to require an exceedingly acute intellect to discover any ground upon which to question the correctness of the ruling of the court below.

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Plaintiff and defendant claim title by conveyance from the same source, to wit: the State of Michigan, and the conveyance to the defendant is prior in time to the conveyance to the plaintiff, and upon what principle the later conveyance can override the earlier seems difficult to understand.

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But, on the part of the plaintiff, it is contended:

(1) That the title to the land in controversy had vested in the State by the act of September 28, 1850, the swamp land act, prior to its selection under the act of August 26, 1852, and hence that it could not and did not pass to the State under said last mentioned act. And hence,

(2) That as the Legislature of the State only authorized the commissioners appointed in that behalf to contract for the construction of the canal in consideration of the lands granted to the State by said last mentioned act, and as the contract only stipulated that the contractors should receive the 750,000 acres of land to be selected under such act, the patent upon which defendant relies is as to the lands in controversy void, for the reason that it was not land which passed to said State by said grant, and therefore could not have been selected under the provisions of that act.

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But, if it should be conceded that the title to the land in controversy did in fact pass to the State by the act of September 28, 1850, I submit that it would not follow that the title to said land did not pass to the St. Mary's Falls Ship Canal Company by the patent in question.

By the act of the Legislature authorizing the contract for the construction of said canal, the State undertook the *selection* of the lands under said grant, and the contractors were to receive the *lands selected.*

The provisions of said act material in this connection are as follows:

The last portion of Section 5 ✗:

"When and as fast as the lands shall have been selected and located, an accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the Commissioner of the State Land Office, whose duty it shall be to transmit to the Commissioner of the General Land Office a true copy of said list, and to designate and mark upon the books and plats in his office the said lands, as St. Mary Canal lands."

SEC. 6. "The commissioners shall require said canal to be constructed and completed within two years from making the contract; and on the completion of the same, within said period, to their satisfaction and acceptance, and the satisfaction of the Governor and engineer, they shall cause a certificate thereof to be signed by the commissioners, Governor and engineer, and filed in the office of the Commissioner of the State Land Office. Thereupon it shall be the duty of the said Commissioner of the State Land Office, forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for the construction of said canal are to be conveyed for the purpose of defraying its costs, and the expenses hereinbefore provided,

which certificates shall run to such persons, and for such portions of said lands so selected and to be conveyed, as the contractor may designate, and shall forthwith be delivered to the Secretary of State, and patents shall immediately be issued thereon, as in other cases."

SEC. 9. "For the selection of the lands granted by Congress, as aforesaid, for the construction of said canal, the Governor shall appoint agents in pursuance of said act. He shall give notice to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selection; and he shall appoint such agents from the persons recommended, if, in his judgment, suitable and proper persons for that purpose."

Now the land in controversy was so selected, and the list called for was filed, and if there was any mistake that mistake was not in the issue by the Secretary of State of the patent for the land in controversy. The act made it his duty to issue a patent for the *lands so selected*, and the list on file with the Commissioner of the State Land Office was the *conclusive evidence to him of such selection.* The case is not, therefore, one where the officer issuing the patent was without

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e { People vs. Cummings Treasurer 7 Mich. 366.
People ex rel vs. Commissioner of Land Office 23 Mich. 270. See 283 - 4.

Hadley vs. Leonard, 35 Mich. 71 Pltff's brief p. 57 has no reference to the statute there
ted and no application to this case.

which the State was not ...

correction of the patent in that regard, but as the grantee only received the amount of land to which it was entitled, the State could not reclaim a portion of such land without making good an equal amount.

I repeat, therefore, that even if it were true that the title to the land in controversy vested in the State under the said act of September 28, 1850, and not under said act of August 26, 1852, the patent of the St. Mary's Ship Canal Company vested the legal title to the land in the grantees thereunder.

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## II.

But, assuming that I am wrong in the above contention, yet it does not follow that the ruling of the Court below was erroneous.

The evidence, so far from establishing or tending to establish that
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(2) That as the Legislature of the State only authorized the commissioners appointed in that behalf to contract for the construction of the canal in consideration of the lands granted to the State by said last mentioned act, and as the contract only stipulated that the contractors should receive the 750,000 acres of land to be selected under such act, the patent upon which defendant relies is as to the lands in controversy void, for the reason that it was not land which passed to said State by said grant, and therefore could not have been selected under the provisions of that act.

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Now the land in controversy was so selected, and the list called for was filed, and if there was any mistake that mistake was not in the issue by the Secretary of State of the patent for the land in controversy. The act made it his duty to issue a patent for the *lands so selected*, and the list on file with the Commissioner of the State Land Office was the *conclusive evidence to him of such selection.* The case is not, therefore, one where the officer issuing the patent was without

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## II.

But, assuming that I am wrong in the above contention, yet it does not follow that the ruling of the Court below was erroneous.

The evidence, so far from establishing or tending to establish that the title to the land in controversy vested in the State by the act of September 28, 1850, establishes exactly the contrary.

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It appears from the evidence introduced:

(1) That after the passage of that act, the then Commissioner of the General Land Office, acting I concede, it must be presumed, under instructions from the then Secretary of the Interior, advised the State that if the State would assent he would base his action in identifying and making lists of the lands under the act upon the evidence of the field notes and plats on file in the office of the Surveyor General of the State, and that the State did so assent by an act of the Legislature in that behalf. This proposition or suggestion of the Commissioner of the Land Office was made by sending to the Governor a copy of a letter to the Surveyor General, a copy of which will be found on page 13 of the record.

(2) That subsequently and under date of ~~May 12, 1853~~ Feb 3, the Surveyor General made a list of lands which he determined appeared to be swamp by the evidence of the field notes and plats, construed in accordance with the instructions of the Commissioner of the Land Office contained in said letter. This list included a large amount of lands in the township containing the lands in controversy and in other townships, but did not include the land in controversy. (Record, pp. 33, 34).

(3) That based upon this list, and hence not including the land in controversy, a list was made and approved by the Secretary of the Interior under date of January 11, 1854, and a copy thereof forwarded to the Governor of the State and thereafter a patent, under date of March 3, 1856, issued to the State for the lands described in said list.*

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This action of the Secretary of the Interior was, I submit, a determination that the land in controversy was not swamp within the intent and meaning of the act of September 28, 1850, and that determination is conclusive, at least against collateral attack.

In advancing this proposition I do not overlook the fact that it has frequently been ruled that the act of September 28, 1850, was a grant *in presenti;* that is, that instantly upon the approval of said act, the title to all lands within the State of the character described became fully vested in it, and that it has also been ruled that such title cannot be

* It will be noticed that the Surveyor General's and the Secretary's approved list of swamp lands were made before the land in question was selected under the canal act, to wit, Surveyor General's list, February 12, 1853, *Record p. 36;* Secretary's approved list, January 11, 1854, *Record, pp. 36, 37, 38;* canal land list, *January 24, 1855.* Record p 30

defeated by failure of the Secretary of the Interior to perform the duty imposed upon him by said act. I make no contention inconsistent with such rulings, as I think I shall make clear.

The grant was of land of a particular character. But it is evident that with reference to many tracts which might be claimed to be of the character described there might be room for question or controversy as to whether they were so or not; because:

(1) Not all lands of a swampy or overflowed character were granted, but only such as were so swampy or overflowed as to be wholly unfit for cultivation, and it is evident that there might be many tracts the character of which in this regard it might be difficult to determine. The opinion or judgment of different men equally well informed might differ.

(2) Again, by the terms of the grant, the whole of any legal subdivision more than one half of which was of the character described, was to be included in the grant; and any legal subdivision some portion of which, but less than one half in area, was of the character described, was *excluded from the grant*, and it might, for that reason, frequently be a question of much nicety to determine whether a particular legal subdivision passed or did not pass by the grant.

It became eminently proper therefore, if not absolutely necessary, to make provision for the determination of the question of identification, and this provision was made by imposing the duty upon the Secretary of the Interior; and it is clear that the nature of the duty was such as required him to receive and act upon evidence and to determine from such evidence the several legal subdivisions of land within the State which were of the character described in the grant, and to make lists of such lands and to cause patents to be issued to the State therefor.

Now, in making such lists, he was required not only to *include* legal subdivisions of the character described but to *exclude* legal subdivisions not of such character, and his *exclusion* of a particular subdivision was necessarily just as much a determination that the same was not of the character granted by the act as his *inclusion* was that it was of such character, and his decision in the one case can no more be subject to collateral attack than his decision in the other case. And no proposition is better settled than that the determination of the secretary that a particular subdivision is of the character granted by the act, by

including the same in a list certified to the State, is not open to collateral attack.

And to hold otherwise, I submit, with reference to lands excluded from lists and patents, would make the performance by the secretary of the duty imposed upon him, with reference to such lands, amount to nothing. His *determination* would *determine* nothing. The question whether or not the title to any particular subdivision not listed or patented to the State by the Secretary of the Interior, vested in the State would remain open till the United States had issued its patent for the same to a third party and till, by actual occupancy under said patent the claim of the State had become barred by the statute of limitations, if the State, under its laws, was made subject to such statute ; otherwise till the crack of doom.

I submit that any contention which leads to such a result is too absurd for a moment's consideration, and no ruling has been made or can be made to sustain it.

The following from the opinion of the trial judge is apt in this connection :

"In giving effect to the grant of 1850, it has been held by the Supreme Court of the United States that, in order that the grant should accomplish its purpose rather than fail, where the Secretary of the Interior had taken no action in executing a duty devolved upon him of designating the lands which should be included in the grant, and where after the lapse of a reasonable time for the segregating of the lands in that way nothing had been done in that direction, parol proof might be received for the purpose of showing that the lands were of the character described in the general language of the act. There is some analogy in this to the case of an appointed arbitrator or umpire who refuses or fails to act. Other means are then allowable to determine the matter, because justice should not be withheld, even though the instrumentalities to it more especially in contemplation fail.

That was the consideration which led to the decision of the Court in *Railroad Co. vs. Smith*, 9 Wallace, 85.

" This, however, does not at all impugn the general proposition that the Secretary of the Interior was intended by Congress to act as the agent of the government in determining the lands in respect of their character upon which the grant should operate, nor the further proposition that where the secretary has discharged his duty and made the determination throughout a State or a comprehensive locality, and no objection was made by the State to the mode and result of the exercise of that duty, and no proceedings, judicial or otherwise, are resorted to for the purpose of modifying the secretary's action, or extending or renewing the exercise of his power over other lands, the State cannot assume that other lands not claimed theretofore under the act and never

listed or approved under it passed to it by the general language of the act, and rest its right to it upon evidence *in pais* in respect to its quality.

"Such a course would render nugatory the substantial purpose of appointing the secretary at all, which manifestly was to identify the lands and thus fix the grant.

"It was a matter of great public convenience and importance that this extensive grant of parcels of the government lands should be identified, and that identification is nothing if after it has taken place the whole matter remains at large" (Record, p. 11).

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## III.

There was no evidence admitted which tended to show that the Secretary of the Interior ought to have listed or certified and patented the land in controversy to the State as enuring to it under said act of September 28, 1850.

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It may be contended here, on behalf of plaintiff in error, as it has been contended elsewhere on behalf of the State, that the acceptance by the State of the suggestion contained in the letter of the Commissioner of the General Land Office to the Surveyor General of the State, found in the Record at page 13, that if the State authorities would assent to that course, the Secretary of the Interior would base his action in identifying the lands to which the State was entitled by the grant upon the evidence of the field notes and plats of the government survey read or construed arbitrarily in a manner indicated in said letter, constituted a contract that all land appearing to be swamp by the evidence of such field notes and plats so construed, should be conclusively deemed to be swamp and overflowed, and thereby rendered unfit for cultivation within the intent of said act of September 28, 1850, and that the title to all such lands should *ipso facto* vest in said State, without any further action by the Secretary of the Interior.

If such contention should be made, it is open to a conclusive answer:

That act imposed upon the secretary the duty to examine evidence, and from it to determine what lands were of the character granted by the act, and to make lists of such lands, and cause the same to be sent to the Governor of said State, and upon his request to cause patents to be issued therefor.

Now, while it is undoubtedly true that the then Secretary of the Interior had the right and authority, so far as his own action was concerned, to determine what evidence as to the character of any particular land he would receive and deem sufficient to satisfy his judgment and conscience, yet he had no right or authority, I submit, to abrogate the duty imposed upon him by the act and to enter into an agreement with the State that all lands which should appear to be to any extent swamp by the field notes read and construed arbitrarily according to a certain formula or which might be included within certain lines, to be arbitrarily drawn by the Surveyor General upon the plats of the government survey, should be conclusively presumed to be of the character granted by the act, and that the title thereto should vest in the State without any action upon his part and without reference to the actual character of such lands; and yet this is the result of the contention under consideration.

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I do not overlook the fact that it has been ruled by this Court in the case of *Railroad Co. vs. Smith*, 9 Wallace, 85, that the neglect or failure of the Secretary of the Interior to perform the duty imposed upon him by the act to identify the lands which passed to the State by said act cannot operate to defeat the title of the State to the lands which were in fact of the character granted, but that in such a contingency the State and its grantees may maintain its title in the courts, when, in any suit, any question as to such title becomes material by testimony of witnesses as to the character of the particular land in controversy in such suit. That is, as explained in *French vs. Fyan*, 93 U. S., 169 (if I rightly understand that case); the *failure or neglect* of the Secretary of the Interior to *perform his duty with reference to certain territory*, such as a State or some subdivision thereof, *not* where it is alleged that the Secretary of the Interior has neglected to perform his duty by failing to include a specific tract of land within a territory covered by lists made by him which it is claimed he ought to have included in such lists.

But it is too clear for argument, I submit, that no agreement made by the Secretary of the Interior could bind any court to receive, or authorize it to receive, a particular kind of evidence or to give any particular weight to any specified kind of evidence. In other words, applying this proposition to the case in hand, an agreement by the Secretary of the Interior that the field notes and plats of the govern-

ment surveys, construed arbitrarily in a manner indicated by him, should be competent, sufficient and conclusive evidence that such lands were of the character granted, could neither bind nor justify a court in receiving or giving such effect to such evidence. In a court the competency of such field notes and plats and their effect as evidence would be determined without any regard to any agreement made or claimed to have been made by the Secretary of the Interior.

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Of course, I concede that to the extent that the secretary actually acted with or without evidence or contrary to evidence and caused patents to be issued, his action was final unless challenged by the United States by a direct proceeding to vacate such patents.

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I have no reason here to question, and make no question, that the field notes and plats of government surveys are competent evidence in any court of any fact which it was the official duty of the surveyor to state therein.

The plaintiff introduced in evidence such field notes and plat, and insisted that they should be read and construed in accordance with the instructions contained in the letter of the Commissioner of the General Land Office to the Surveyor General hereinbefore mentioned, and that so read and construed they conclusively proved the land in controversy to be swamp. Now,

(1) For a reason already stated, to wit, that the Secretary of the Interior, by omitting said land from lists covering the territory in which they were, had determined that such field notes and plat did not show such land to be swamp, such field notes and plat were not admissible in evidence to overthrow such determination, no matter how they might be construed.

(2) The Court, as I have already argued, was not bound to construe such field notes and plat in accordance with any construction which the Secretary of the Interior might have authorized to be put upon them for his action.

(3) Giving to such field notes and plat the most favorable construction to which they would be open, independently of such arbitrary construction claimed to have been authorized by the Secretary of the Interior, they had no tendency to show that a single foot of the land in controversy is or was on September 28, 1850, to the slightest extent

swamp, much less that it was swamp and overflowed and rendered thereby unfit for cultivation.

All that such field notes show is that the exterior lines of said section intersect swamps as stated and indicated on the plat. Such field notes do not show the extent or character of such swamps. The plat purports to show the outlines of said swamps, and as thus shown neither of said swamps touch the subdivision of said section in controversy.

The claim on behalf of plaintiff is that the plat shows such subdivision to be swamp by the fact that more than one-half of such subdivision is included within certain lines which connect a swamp shown as extending from a southwesterly direction on to the west half of the southwest quarter of said section, and a swamp extending from the north on to the north half of said section, and that the letter "S" appears on the subdivision in question in pencil. (See plat between pp. 28 and 29 Record.)

And the theory on behalf of the plaintiff seems to be that these lines were drawn and this letter "S" placed on said plat by the Surveyor General to indicate his decision that the subdivision in question, more than one-half of which was included within said lines, was swamp.

Now (1), there is no evidence in this case to sustain such theory, except testimony to a tradition to that effect in the office of the State Land Commissioner, (testimony of J. H. Porter, Record, p. 20); (testimony of L. H. Briggs, Record, p. 22); and (2), if it was sustained by the evidence it would not avail to aid plaintiff.

1. The Surveyor General was not charged with duty of deciding what lands were swamp within the meaning of the said act.

2. The fact that the Surveyor General did not include the land in controversy in the list made by him, rebuts any inference that he had by drawing said lines and placing said letter "S" upon the plat, determined the same to be swamp.

3. The Secretary of the Interior, by omitting said land from the list approved by him, must be held to have determined said land not to be swamp within the intent of said act.

## IV.

For a reason which already appears, to wit: that the decision of the Secretary of the Interior that the State was not entitled to the land in controversy as enuring to it under the said act of September 28, 1850, the ruling of the Court below in excluding the offer of the plaintiff to show by oral evidence that the land in controversy was, in fact, swamp, was correct. The portion of the opinion of the trial judge, which I have already quoted, is apt in this connection, and so is the following from that opinion:

"The most that can be claimed on the facts inferred most favorably to the plaintiff is that the State (the State of Michigan in this case), had a right to have this land listed and approved by the Secretary of the Interior and thus designated as part of the grant; but it was a right which was not asserted by the State.

"If it had been it might have been disputed by the secretary, and if he had denied it, it would never have ripened into title.

"At least, this would be so unless some further proceedings should be taken to vindicate and enforce that right.

"Instead of insisting upon the right (if it had it), the State selected and received this description under another grant and conveyed it for a valuable consideration to a third person, who took it *bona fide*.

"The State could not after this had been done be heard to say that it would repudiate its own course, and dishonoring its patent, claim title under the act of 1850 and resell it to another.

"Certainly this could not be done without a judicial proceeding instituted for that purpose. How that might have resulted it is not for me to say, but it is the inclination of my opinion that the result here indicated must be the result, even in such proceeding as that or anywhere where these facts came in controversy.

"The result of these views is that the offers of oral evidence would be declined. The oral evidence offered to show that these lands were swamp lands, such as are mentioned in the grant, is, upon what appear to be undisputed facts, rejected, and the court will therefore instruct the jury that, upon the facts as they are made to appear in this case, the defendant is entitled to the verdict." (Record, p. 12.)

The case here is the converse of the case of *Railroad Co. vs. Smith*, 9 Wall, 85, in which it was held that oral evidence was admissible to show the land in controversy to be swamp, etc., for the reason that the Secretary of the Interior had made no lists, and the decision implies that if he had made lists such evidence would not be admissible.

In conclusion, I beg to apologize for the length of this argument. It does not seem to me that the questions involved are such as to demand the extended consideration I have given them. My justification for thus having trespassed upon the attention of the Court is that, notwithstanding the fact that the State of Michigan had already received as swamp and overflowed, and therefore unfit for cultivation, and as thus enuring to it under said act of September 28, 1850, nearly 5,700,000 acres of land—nearly one-sixth of all the land within its boundaries—the land department of this State put forth the claim about the time this suit was begun that the State was still entitled to over 1,600,000 acres of land (Record, p. 23) as enuring to it under said act, the greater part of which the United States had disposed of by patent or otherwise, and which claim is to a large extent based upon the same state of facts and theories here put forth by the plaintiff; and that suits in the name of the State and its recent grantees are now pending to recover a very large amount of land so claimed.

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I submit that the judgment below should be affirmed.

ASHLEY POND,

*Of Counsel for Calumet & Hecla Mining Co.*

# APPENDIX.

*An act granting to the State of Michigan, the Right of Way and a Donation of Public Land for the construction of a ship canal around the Falls of St. Mary's, in said State.*

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That there be, and is hereby, granted to said State the right of locating a canal through the public lands, known as the military reservation at the Falls at St. Mary's River, in said State; and that four hundred feet of land in width extending along the line of such canal be, and the same is hereby granted, to be used by said State, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances thereto, and the use thereof is hereby vested in said State forever, for the purposes aforesaid, and no other; *Provided*, That in locating the line of said canal through said military reservation, the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said falls, as, under the approval of the Secretary of War, may be selected. *And provided further*, That said canal shall be at least one hundred feet wide, with a depth of water twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide.

SEC. 2. *And be it further enacted*, That there be, and hereby is granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing said canal, seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeable to the United States surveys, by an agent or agents to be appointed by the Governor of said State, subject to the approval of the Secretary of the Interior, from any land within said State, subject to private entry.

SEC. 3. *And be it further enacted*, That the said lands hereby granted, shall be subject to the disposal of the Legislature of said State for the purpose aforesaid and no other; and the said canal shall be, and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said government engaged in the public service, or upon vessels employed by said government in the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted*, That if the said canal shall not be commenced within three and completed within ten years, the said State of Michigan shall be bound to pay to the United States, the amount which may be received upon the sale of any part of said lands by said State, not less than one dollar and twenty-five cents per acre, the title to the purchasers under said State remaining valid.

SEC. 5. *And be it further enacted*, That the Legislature of said State shall cause to be kept, an accurate account of the sales and net proceeds of the lands hereby granted and of all expenditures in the con-

struction, repairs and operating of said canal, and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior, and whenever said State shall be fully reimbursed for all advances made for the construction, repairs and operating of said canal, with legal interest on all advances, until the reimbursement of the same, or upon payment by the United States, of any balance of such advances over such receipts from said lands and canal, with such interest, the said State shall be allowed to tax for the use of said canal, only such tolls as shall be sufficient to pay all necessary expense for the care, charge and repairs of the same.

SEC. 6. *And be it further enacted*, That before it shall be competent for said State to dispose of any of the lands to be selected as aforesaid, the route of said canal shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof, in the office of the Commissioner of the General Land Office.

Approved August 26, 1852.

149 U.S. 79

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

JOSEPH H. CHANDLER, PLAINTIFF IN ERROR,

vs.

THE CALUMET AND HECLA MINING COMPANY,
DEFENDANT IN ERROR,

*Error to Circuit Court United States, Western District of Michigan.*

BRIEF OF T. L. CHADBOURNE FOR DEFENDANT IN ERROR.

# SUPREME COURT OF THE UNITED STATES.

JOSEPH H. CHANDLER, PLAINTIFF IN ERROR,

vs.

THE CALUMET AND HECLA MINING COMPANY,
DEFENDANT IN ERROR.

## Statement of Case.

Chandler brought an action of ejectment against the mining company, claiming in fee simple the southeast quarter (¼ of the northwest quarter (¼) of section 23, in township 56, north of range 33 west, in Houghton County, Michigan.

On the trial in the United States Circuit Court, Western District of Michigan, the jury was instructed to find the issue against the plaintiff for reasons stated in the printed record, pages 11 and 12, and from the verdict and judgment thereon he appeals.

Chandler received a patent for this land from the State of Michigan, dated November 23d, 1887, based upon an entry of the same made by him upon Houghton County "Swamp Land Scrip. (Record, p. 29.)

He contends that at the time of his purchase the title was in the State, under the Federal grant to the State in 1850 of swamp lands. (Act of Sept. 28th, 1850.)

He put in evidence the notes of the United States survey of the section, and the "plat" drawn in the surveyor's office based upon the notes, which he submitted as tending to show the land was swamp. These were received in evidence, but testimony tending to show that the land was swamp and overflowed in fact, offered by him, was rejected.

The mining company put in evidence a portion of the swamp land list, embracing the entire surveyed township in which the

*locus* is situate, made and certified as correct by the Surveyor General, and approved by the Secretary of the Interior. (Record, pp. 33–38.) This approval was January 11th, 1854.

These lists embrace two forties in the Section 23 in question, but do not include the *locus*.

The United States, March 3d, 1856, conveyed by patent to the State, as swamp lands, all the descriptions appearing in said list, but not the *locus*, nor has the *locus* ever been patented by the United States, or listed and platted as swamp, by or under the authority of the Secretary of the Interior. (Record, p. 38.)

In 1852 an act was passed by Congress, and in 1853 one by the State of Michigan, whereby the former granted a large tract of land for the purpose of making a ship canal at Sault St. Marie, Michigan, and the latter accepted and provided for the selection of the same.

Under this State legislation a corporation was formed, the building of the canal awarded, the lands to make up the grant selected by State agents provided for in the Statute, the canal built, and the lands so selected approved and certified to the State by the Secretary of the Interior. (Record, p. 30.)

This occurred before May 25th, 1855, and among the lands so selected and approved was the *locus*.

On that day the State patented to the said corporation a portion of the lands so selected and approved, including the *locus*, as and for lands granted by the government for the purpose of building the canal (Record, pp. 30, 31), and the patent was recorded in the office of the Secretary of State of Michigan on the same day.

Ever since 1860 the State has taxed the *locus* and the taxes have been paid by said corporation and its grantees, including the Mining Company.

The *locus* had never been offered for sale in Michigan, at public auction. (Record, p. 40.)

There is no evidence impeaching the good faith of the State agent who selected the land, of the canal corporation, or of its grantees, in the transaction, and no pretence but that the whole transaction, as to all concerned, and from the beginning to the end, was innocent and above suspicion.

## ARGUMENT.

This being an action of ejectment, the question is, did the plaintiff make out a case for the jury, either by the evidence received or by the evidence rejected?

The judge who tried the case below put his ruling upon two grounds, and to these I shall add two more.

To begin with the grounds taken by the trial judge:

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### I.

The Secretary of the Interior was authorized by the swamp land legislation to determine what were swamp lands; he did so determine with respect to the *locus*, and his determination cannot be drawn in question by evidence in contradiction of it respecting the quality of the land.

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### II.

Since the State was vested with the absolute proprietorship of the swamp lands, and assuming that the *locus* might have been claimed as belonging to that class of lands; yet the State having itself selected the *locus* under another grant (viz: As "Canal" lands) and conveyed it as such, for a valuable consideration, to a third person, who took it *bona fide*, is now estopped from repudiating its choice.

These are, and either of them is, entirely conclusive of the case, but I shall add and argue two others.

---

### III.

The evidence offered to show that the land was "Swamp" in fact was properly rejected, and there is no evidence in the case in any degree tending to show that the land comes within the terms of the Swamp Land Act of 1850.

IV.

The patent issued to the plaintiff is, under the evidence in the case, void, because of want of any authority whatever in the State officers to issue it.

These propositions will be discussed in their order.

---

FIRST.

In Michigan and Wisconsin a rule for the identification of swamp land was adopted, different from that in the other States which were donees of the grant.

Michigan passed an Act June 28th, 1851, reading as follows:

"Section 1: The people of the State of Michigan enact, that they adopt the notes of the surveys on file in the Surveyor General's office as the basis upon which they will receive the swamp lands granted to the State by an Act of Congress of Sept. 28th, 1850.

"Section 6. Said lands shall only be sold in the same legal subdivisions in which they shall be received by the State, nor shall any of said lands be subject to private entry until the same shall have been offered for sale at public auction as hereinbefore provided." (Howell's Annotated Statutes of Michigan, Sections 5381, 5382.)

The swamp land act (U. S. Rev. Stat., Sec. 2480) provides: "It shall be the duty of the Secretary of the Interior to make accurate lists and plats of all such lands and transmit the same to the governors of the several States in which such lands may lie, and at the request of the governor of any State" to issue patents therefor, etc.

"Section 2481. In making out lists and plats of the lands aforesaid all legal subdivisions the greater part whereof is wet and unfit for cultivation shall be included in said lists and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

Section 2479 describes the gift as follows:

"The whole of the swamp and overflowed lands made unfit thereby for cultivation and remaining unsold," etc.

Michigan, by this legislative action abandoned all right to identify by her own agencies, or in her own mode, or to aid the Secretary of the Interior in identifying these lands; she adopted as the basis on which she would receive the swamp land, "the notes of the surveys on file in the Surveyor General's office."

These were well-known public documents then existing. Michigan elected to take her swamp lands as the Secretary of the Interior should list them, using as the basis of such listing the notes of the surveys.

The Secretary was made the final arbiter of the question of the nature of a given piece of land, whether "swamp" or not. The federal statute made him the judge, and the state accepted him as such and defined the *modus* by which they desired him to proceed. His judgment on the question was final, at all events against every form of indirect attack.

Johnson vs. Fowsley, 13 Wall 72.
French vs. Fyan et al., 93 U. S. 169.

While in this last case the principle was applied to shut out testimony that the land was *not* swamp in fact, against the decision of the Secretary, by listing the same as swamp, that it was swamp, the same reasoning applies with like conclusiveness to an attempt to show land to be swamp in fact, in the face of the Secretary's adjudication that it is not, appearing by his not listing or patenting it while selecting out of a township the swamp land contained in it.

Here the Surveyor General, using the field notes as a basis, makes a list of the swamp lands in township 56–33, conforming to the commissioner's letter of Nov. 21st, 1850; this the commissioner finds to be correct, and the Secretary of the Interior sees and approves the action of these officers. (Record, pp. 33–38).

Now, one of two things must be true. Either the action of the Secretary in selecting the swamp land in a given township is a determination that all the lands therein not so selected are not swamp land; or if not so, then all lands not so selected as swamp may be (no other sufficient reason to the contrary appearing), at any time thereafter, put in that category by him; or, what is still more monstrous, by any grantee who may succeed in getting a patent for it from the State authorities; and the question whether land belongs to the State or to the general government be kept open indefinitely, until in the case of each piece an actual and adverse possession might settle the question upon other grounds.

Such a rule would violate the plainest principles of both common sense and common honesty.

In Michigan it would open to attack thousands, if not tens of thousands, of titles upon which the owners have rested as securely as the United States rests respecting the ground on which the Capitol stands.

Not only "wild lands" would be affected, but farms, settlements, villages, homesteads, churches and schoolhouses.

The Secretary *selected, picked out, separated, segregated* and *identified* the swamp lands in 56–33 as he was bidden by Congress and commissioned by Michigan to do. In doing so he did *not* include as part of such lands the southeast quarter of northwest quarter of 23. There is no pretense that he has ever been asked again to perform the duty as to this township, nor that claim has ever been made by the State of Michigan that he did not include all the swamp land in that township, nor that he failed to include this forty acres and that this is swamp and ought to be listed as such.

It was not selected, platted, listed or included as swamp by the Secretary, although thousands of acres just about it were. But to the inevitable conclusion that, "therefore it was not swamp," the plaintiff here is understood to say:

"That settles nothing. If it was more than half a swamp it belongs to the State as 'Swamp,' and may be granted to me

as such at any time, although the issue of the patent to me be the first sign that anyone has ever so considered it."

One who submits to a court a claim of items aggregating twenty-five dollars, out of which the judgment of that court allows ten only, is forever barred of the remainder, as thereby passed upon and *dis*allowed. Yet on the plaintiff's contention, no forty-acre tract in Michigan which was more than half swamp in 1850, will ever be beyond the reach of speculation and litigation, on complaint of that State, or its grantees, until hostile occupation may of itself create a title!

Let the maxim then be altered to suit the times, and run:

"It is of importance to the commonwealth that litigation should come to an end, in all matters except those touching title to wet lands in the West!"

The evidence, offered and rejected, to show by parol the character of the land in 1850 was properly rejected. 1st. Because that question was fully passed upon and decided by the proper officer charged by law with its decision, on the 11th day of January, 1854.

2d. Because if the question were still open, parol evidence of the character of the land is only admissible where the tribunal appointed by law, viz: the Secretary, has neglected or refused to act in the premises.

There is no showing that he ever, with respect to the locus, neglected or refused to determine its character.

French vs. Fyan, supra.
Wright vs. Roseberry.

Ofs grantor

Ofs grantor

## SECOND.

Irrespective of the question above argued, the court below adjudged the State estopped from now claiming the *locus* as part of the swamp land grant.

Congress, by act of August 26th, 1852, "for the construction

of a ship canal around the Falls of St. Mary's," granted to Michigan for that purpose 750,000 acres of land in that State.

Michigan, by acts approved February 5th, 1853, and February 12th, 1853 (a copy of which are made an appendix of this brief), accepted the grant, provided for the letting of a contract for the work, and that the lands should be selected for the State by agents appointed by the governor of the State for that purpose, etc., etc.

These lands were so selected, including the *locus*. A contract was made with certain individuals who assigned their rights to the land to a corporation—the St. Mary's Falls Ship Canal Company, covering the building of the canal, in consideration of the grant of lands aforesaid. The canal was built according to the contract and the lands so selected conveyed to it by the State in payment therefor, the particular patent carrying the *locus* bearing date May 27th, 1855, and being recorded in the office of the Secretary of State of Michigan the same day.

Since that day (except the first five years, during which the land was exempt from taxation by virtue of the State act) the State has regularly taxed the *locus*, and the taxes have been paid by its said grantee and by the defendant. (Record, pp. 29–33; 38–40.)

Unless the State is to be exempt from the obligation to be honest, to which natural persons are held by the laws of the land, the foregoing facts create against it an estoppel of the most satisfactory and indubitable kind.

"At the time of the selection of this land by your agent and its conveyance to ~~plaintiff's grantee~~, you represented it, by virtue of that selection and conveyance, as a part of the grant for canal purposes, under the Act of Congress of 1852.

The ~~plaintiff's grantee~~ took it in good faith, in complete reliance upon your representations, believing it to be what you called it. It has been held ever since in perfect confidence inspired by the foregoing facts; for near a generation taxes have been paid upon it, and the grantees have so improved it that it has increased in value from $50, or less, to $10,000, or more. (Record, p. 13.)

When your agent selected and you conveyed it as "canal" land, you thereby certified that it was not swamp land, for you owned both classes of land. You cannot now be heard to claim it as swamp lands to the destruction of your grantees title.

You are estopped. In the words of the District Judge, "the State could not, after this had been done, be heard to say that it would repudiate its own course, and dishonoring its patent, claim title under the Act of 1850 and resell it to another."

From 1855 to the date of the Chandler patent in 1887, and during all that time, except the first five years after the selection and conveyance above described, the State's first grantees had openly asserted title for twenty-seven years by paying taxes levied for that time upon it by the State.

This particular piece of land may be as valuable as all the remainder of the 750,000 acres granted for the building of the canal.

How can the State now resume the grant as improvidently made, and how, if it were permitted to do so, could it be compelled to compensate the corporation which built the canal? May it keep the canal and reclaim half the price paid for it?

When the State directed its agent to select the lands granted by the act of congress of 1852, that was a direction to him to use his judgment as to a given piece of land, whether it was swamp land, and therefore already belonging to the State, or not—certainly in cases where such land had not been already identified in the manner provided by law, viz: by the Secretary of the Interior upon the notes of survey as a basis. The *locus* had not been so identified.

Suppose the agent of the State who selected the *locus* went upon it and estimated or measured the swamp part as compared with the dry part, and concluded or found that a greater area was dry, and thereupon listed it as canal land, can his determination now be questioned by the State, thirty-two years after its conveyance to our grantor? Indeed, could it have been questioned at any time after its conveyance to our grantor?

If the agent selected it in good faith, believing it to be within the description of canal land, and not within the description of swamp land, and our grantor accepted it in the like good faith,

believing the same, the act is irrevocable, except by the consent of both parties.

The agent made, we will assume, a mistake of fact, but he was authorized by the State to pass upon these very facts, and that his conclusion is wrong is no reason at all for depriving one of the land (or any part of it), to whom the State has conveyed it in payment for work.

Although in so doing I go beyond the needs of the case, I submit this is more than mere estoppel. That to say "the plaintiff's grantor has waived the right it once had of reclaiming this tract from the conveyance of it made to the canal company," is to take an erroneous view of the situation.

The State never had that right after the delivery of that conveyance, without an entirely different showing from any made in this case.

In selecting the *locus* as canal land, the State agent was not acting beyond the limits of his power, but strictly within them, provided the selection was an honest exercise of his judgment.

Had the *locus* been "listed" or patented to the State as swamp land, the argument might not hold.

But in fact the *locus* was only a piece of land (*argumenti causa*, supposed to be), partly swamp, and so alleged to come within the description of the granting Act of Congress; therefore it lay like all other land (apparently), belonging to the Government and subject to be taken under the Act of 1852. Whether it could be taken under that Act or not, depended solely upon an exterior question, a question of fact and judgment; *i. e.*, What part of it, —the swamp or the dry land, exceeded the other. That matter was determined—must have been determined—by the agent under his commission, and from such a determination in good faith there could have been no appeal either by the State or the beneficiary of the grant.

But if this be not so, there can hardly be a serious question of the estoppel.

State of Indiana vs. Milk, 11 Bissell, p. 205.
Clark vs. United States, 95 U. S. p. 544.
U. S. vs. McLaughlin, 12 Sawyer, p. 201.

U. S. vs. Wallamet, etc. Wagon Co. 42 Fed. Rep. p. 359.
Commonwealth vs. Heirs of André, 3 Pick. 224.
Commonwealth vs. the Pejepscut Proprietors, 10 Mass. 154.
People vs. Maynard, 15 Mich. 470.
The State vs. Barley et als., 19 Ind. 452.

*Cohn vs. Barnes*, 7 Sawyer, 48, is almost identical in its facts (so far as the question of estoppel goes) with the case at bar.

See also Hough vs. Buchanan, 27 Fed. Rep. 328.
Pengra vs. Munz, 29 Fed. Rep. 830.

In *State vs. Flint*, 89 Mich. 481 (S. C. N. W. Rep., Vol. 51, p. 103), decided after the present controversy arose, this aspect of the subject, upon facts very similar to those at bar, is fully gone into and many of the above cited cases commented upon.

Whether the party here is equitably estopped by the facts above recited, or whether the identification of the above piece of land by the State through its Land Agent, and by the United States through the Secretary of the Interior as "canal land," is a final adjudication of that matter, in either case and upon either theory the judgment below was right.

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## THIRD.

Let it be assumed that the evidence offered to show the land swamp in fact was inadmissable,—was properly excluded.

Then the judgment was right upon another ground, viz:

That there was *no evidence in the case* tending to show the land to be swamp.

The patent, if its recital was *prima facie* such evidence, was of course overthrown by the contrary recital in the previous patent to our grantor.

I shall show that nothing whatever of that tendency remained even under plaintiff's own theory.

He was understood to contend that the straight lines drawn in pencil, and inclosing a part of the *locus*, and the letter "S" in pencil thereon, upon the plat (a copy of which appears in the printed record), had this tendency.

1. Laying out of account for the present the requirement of the statute of 1850 that the Secretary should identify and list the swamp lands, there is nothing in the statute authorizing *any one* to separate or indicate these lands by marking an "S" in pencil or otherwise upon the plats. Nor is there any testimony that any one ever did any such thing with the intent thereby of indicating such lands. (Note further that southeast quarter of northwest quarter of 23 is marked "S" and is *not* listed or patented as swamp; that the northwest quarter of the southwest quarter is not marked "S," but *is* listed as swamp.)

2. But it was claimed, as understood by the writer, that the straight pencil lines which enclose the (slightly) major part of the *locus* formed such a separation (or was evidence that way), because drawn in conformity with the letter of instructions of the Land Department to the Surveyors General as to the mode of ascertaining the swamp parcels. The theory advanced was that that was swamp land under the grant, which would appear to be such when lines should be drawn upon the plat *in conformity with the instructions of the letter*, and that, in fact, over the section 23 in question the lines had been so drawn, and showed the *locus* to be swamp.

Again, waiving the point that in Michigan there can be no swamp lands except those listed by the Secretary as such, upon the basis of the field notes, the above contention is wholly untrue in point of fact. It is *not* true that the instructions given in that letter would make the *locus* swamp land. It is wholly untrue.

The letter (Record 13-15) runs (the italics are mine):—

"Where the field notes are the basis (as in Michigan by its statute they were), and the *intersections* of the lines of swamp or overflow with those of the public surveys *alone* are given, those intersections may be connected by straight lines, and all the legal

sub-divisions, the greater part of which are shown by these lines to be within the swamp or overflow, will be certified to the State; the balance will remain the property of the Government."

Now turn to the field notes (Record 26-27) touching Section 23.

Running North from South-West corner, we have:

"10.00 Enter Swamp C. S. W." (Course South-West.)

"31.50 Leave swamp C W." (Course West.)

and going West from the North-East corner:

"27.00 enter swamp C. S. E." (Course South-East.)

"38.50, Old beaver dam."

"48.00 Leave swamp C. S. E." (Course South-East.)

Thus it appears that instead of "the *intersections* of the lines of swamp or overflow with those of the public surveys *alone*," being given, in this case there was also given *other information of the highest significance and importance* for guiding the judgment upon the condition of the land in the interior of this section.

The Surveyor General learned from the notes on the West line, not only where the swamp *intersects* the line in two places, but also *in what direction the swamp trended* at those intersections; and upon the North line he had the like additional information, and the further information that a beaver dam had been built there.

He had ample *data*, therefore, for concluding, with a high degree of probability, how far these swamps went into the section, and how many forties therein they probably covered in greater part, and *that they did not reach, or did not for the greater part cover the locus.* Now it was only when he should wholly lack such information in the notes—where he knew the point of intersection alone—that he was permitted by his instructions to conjecture how far the swamp extended by drawing these lines.

*He was not, therefore, in this case, expected or instructed to draw such lines, and if he did draw them, it was not in conformity with his instructions that he did so.*

If he did draw them, he did not act upon them with respect to the *locus*, for he did not list it; and in not acting on them he was in the strict performance of his duty.

That the courses laid down in the survey notes, and the beaver dam, were *considered by the Surveyor General* very significant and

important facts as bearing upon the extent of swamp within the section, appears clearly and beyond question by the manner in which the swamps were delineated by him upon Section 23. That on the west side is figured as extending only part way into the northwest quarter of southwest quarter, and that on the north side part way into the northeast quarter of northwest quarter, leaving the *locus* (southeast quarter of northwest quarter) wholly untouched by it; and this result is reached by prolonging into the Section the outline of the swamps conforming to the trend contained in the survey notes.

This plat and everything upon it, except the straight lines and letters "S," was made in 1846, and the pencil lines not till after the date of the above letter.

Doubtless in many of the public surveys the swamp intersections "alone" were given in the notes; hence the particular directions of the letter meant to meet those cases.

This is all the statute upon the subject of surveyors' duties required: ".....Every surveyor shall note in his field book .....all water courses over which the line he runs may pass, and the quality of the land." (U. S. Rev. Stat., Sec. 2495, Subd. 7.)

It is confidently submitted, therefore, that these lines and marks in pencil are not evidence in favor of the plaintiff, and therefore that there is no evidence whatever in the record tending to sustain the plaintiff's case.

But I go much further than this and submit with confidence, although again beyond the needs of the case:

That the field notes and plat show conclusively that the *locus* is *not* swamp land, Michigan having agreed to take the swamp land on the basis of "the notes of the surveys on file in the Surveyor General's office."

Thus:

1. The plat drawn in accordance with the field notes shows it is *not* swamp.

2. The plat, treated in accordance with the suggestions or directions of the letter of instructions does not make the *locus* swamp, as shown above.

If the plaintiff's position were true, therefore, that the Secretary of the interior had not acted on the question, and that the question is still open, this proof shows that should the Secretary act he would necessarily adjudge the *locus* not to be swamp.

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But the judgment below was right too, if upon the record plaintiff's patent was issued in behalf of the State, without authority, and was therefore void.

---

## FOURTH.

That it was issued without authority of law and was therefore void, seems clear.

The State had already, thirty-two years before, patented this land to our grantor.

In *People vs. Cummings*, 7 Mich. 366, the commissioner of the State land office issued a swamp land certificate to B, entitling him to a patent therefor when full paid. Afterwards concluding that B had not been entitled to receive that certificate, he issued another for the same piece of land to C. The State Treasurer having declined the application of B's assignee for leave to pay the balance of the purchase money due, so that he might obtain a patent, was compelled by the court to receive it.

The opinion runs:—

"[Until th... easons

See { People vs. Cummings Treas... / People ex rel vs. Commissio... } ...er to ...as he ...t the ...more mis-

Hadley vs. Leonard, 35 Mich ... quoted and no application to this c...

... and no purs... than that of issuing certificates of purchase for the same land to different persons, under circumstances like those before as in this case."

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That it was issued without authority of law and was therefore void, seems clear.

The State had already, thirty-two years before, patented this land to our grantor.

In *People vs. Cummings*, 7 Mich. 366, the commissioner of the State land office issued a swamp land certificate to B, entitling him to a patent therefor when full paid. Afterwards concluding that B had not been entitled to receive that certificate, he issued another for the same piece of land to C. The State Treasurer having declined the application of B's assignee for leave to pay the balance of the purchase money due, so that he might obtain a patent, was compelled by the court to receive it.

The opinion runs:—

"Until th[illegible]

See { People vs. Cummings Treasurer 7 Mich. 366.
People ex rel vs. Commissioner of Land Office 23 Mich. 270. See 283 - 4.
Hadley vs. Leonard, 35 Mich. 71 Pltff's brief p. 57 has no reference to the statute there quoted and no application to this case.

[illegible] more mis- [illegible] be pursued than that of issuing certificates of purchase for the same land to different persons, under circumstances like those before as in this case."

Of course the same reasoning would apply to patents, since they are founded upon the certificates. The certificate is a patent for most purposes. Howell's Statutes, Sec. 5307. On surrender of certificates the patents issue. Secs. 5304, 5305, 5395.

The patent was void for another reason. The land had never been offered for sale at public auction (Record, p. 40), and the State officers had no power to sell an acre of swamp land which had not first been so offered.

Howell's Statutes of Michigan, Sec. 5391, heretofore quoted.
Attorney General vs. Smith, 31 Mich. 359.
People vs. Pritchard, 17 Mich. 260.

It is respectfully submitted the judgment should be affirmed.

T. L. CHADBOURNE.

NOTE:—In the following appendix will be found copies of the Swamp Land Act of 1850, and of the United States conferring the canal lands and of Michigan accepting them.

# APPENDIX.

## Laws of Michigan, 1853.

Page 48. No. 38.

*An Act to provide for the construction of a Ship Canal around the Falls of St. Mary.*

Section 1. *The People of the State of Michigan enact,* That the act of Congress entitled "An Act granting to the State of Michigan the right of way and a donation of public land for the construction of a Ship Canal around the Falls of St. Mary, in said State," approved August 26, 1852, is hereby accepted, and all conditions expressed in this act are hereby agreed to and made obligatory upon the State of Michigan.

Sec. 2. For the purpose of carrying out the objects of said act, the Governor is hereby authorized, by and with the advice and consent of the Senate, to appoint five commissioners and an engineer, who shall prepare a plan for the construction of said canal, in conformity with the provisions of said act of Congress and this act, to be approved by the Governor, and who shall have the entire and absolute control and supervision of the construction of said canal; and said commissioners are authorized and empowered to make all necessary contracts for the construction of the same; and during said construction, if at any time said commissioners shall be dissatisfied with the manner of construction or the materials used, it shall be competent for them, or a majority of them, to direct the contractor to construct the same in such other manner, and to use such other materials, as to such commissioners, or a majority of them, or engineer, shall seem necessary to insure a permanent and durable work, and this condition shall be embodied in any contract made for construction of said canal. In case any controversy shall arise between the commissioners and contractor or contractors in regard to said materials, or the manner of doing said work, during the construction of said canal, the same shall be decided by a Board, to consist of said engineer and the Governor of this State, and the District Judge of the Upper Peninsula, who shall decide thereon in a summary manner, and the decision of a majority of them shall be binding and conclusive upon the contractors, who shall thereupon proceed with the work in the manner and make use of the material so required by said board or a majority of them:

*Provided, however*, That the work upon said canal shall not be suspended or delayed by reason of said controversy, and the contractors shall proceed therewith as required by said commissioners. The locks in said canal shall not be less than three hundred and fifty feet long, and not less than seventy feet wide: *Provided*, That all appointments made by virtue of this act, shall cease and determine when said canal is completed.

SEC. 3. The said commissioners shall receive proposals for the construction of said canal, agreeably to said plan; and in deciding upon said proposals, are required to take into consideration the responsibility of the person or persons offering to contract for the same, and his or their ability to carry into effect the object and intention of said act of Congress, by constructing said canal in the best and most expeditious manner; and said commissioners, in making said contract, shall require good and ample security for the performance thereof. Neither the commissioners, or Governor, or the engineer, or any member of this legislature, or any person related to the commissioners or engineer, shall in any manner be interested in the contract, directly or indirectly, for the construction of said canal.

SEC. 4. No contract for the construction of said canal shall take effect until it shall have been approved by the Governor and engineer.

SEC. 5. The contractor or contractors for the construction of said canal shall defray the entire cost of surveying, locating and constructing the same; the necessary traveling and other expenses of the commissioners; the salary of the engineer and assistants. The necessary expenses of the commissioners shall be paid out of the State Treasury, upon the warrant of the Auditor General. The engineer shall have power, with the approval of said commissioners, to employ such assistants as may be necessary and proper. The assistants shall receive such reasonable compensation for their services as may be agreed upon by said commissioners, and the engineer and assistants shall be paid out of the State Treasury, from time to time, upon the account of each respectively being certified to be correct by said commissioners, and upon the warrant of the Auditor General. The cost of locating the said canal, and all expenses of every kind incidental to the supervision of the construction and completion of said canal, shall be reimbursed by the contractors as fast as ascertained, and shall be paid by them into the State Treasury, and under the direction of said commissioners. When and as fast as the lands shall have been selected and located, an accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the Commissioner of the State Land Office, whose duty it shall be to transmit to the Commissioner of the General Land Office a true copy of said list, and to designate and

mark upon the books and plats in his office the said lands as St. Mary canal lands.

SEC. 6. The commissioners shall require said canal to be constructed and completed within two years from making the contract, and on the completion of the same within said period to their satisfaction and acceptance and the satisfaction of the Governor and engineer, they shall cause a certificate thereof to be signed by the commissioners, Governor and engineer and filed in the office of the Commissioner of the State Land Office. Thereupon it shall be the duty of the said Commissioner of the State Land Office forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for the construction of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided, which certificates shall run to such persons, and for such portions of said lands so selected and to be conveyed, as the contractor may designate, and shall forthwith be delivered to the Secretary of State, and patents shall immediately be issued thereon, as in other cases.

SEC. 7. That said commissioners shall keep an accurate account of the sales and net proceeds of the lands granted by said Act of Congress, and of all expenditures in the construction of said canal, and the earnings thereof, and on or before the first Monday in October in each year, return a statement thereof to the Governor, whose duty it shall be to return the same, or a copy thereof, to the Secretary of the Interior, at Washington, as required by said Act of Congress.

SEC. 8. The said commissioners shall be subject to removal for cause by the Governor, and if a vacancy shall occur by removal or otherwise when the Legislature is not in session, the Governor may fill such vacancy, and the person so appointed shall hold his office until the Legislature meet.

SEC. 9. For the selection of the lands granted by Congress as aforesaid, for the construction of said canal, the Governor shall appoint agents, in pursuance of said act. He shall give notice to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections, and he shall appoint such agents from the persons so recommended if, in his judgment, suitable and proper persons for that purpose.

SEC. 10. That such contractor is by this act empowered and authorized to associate with himself in the obligation, agreements and conditions of said contract, such person or parties as he may elect, and assign to them such proportional interest in the remunerations of lands, or the avails thereof, as he may decide and agree upon; or he may assign his rights, privileges and remunerations under the contract with the State, to any association organized according to the laws of this or any other State; and

upon due notice to the board of commissioners and Governor, they shall be made parties to the obligations and emoluments of the contract, and be authorized upon such assignment and notice, to hold and sell lands, and improve and use the same as they may see fit and desirable, to the same extent that the contractor might individually have done; but in no case shall himself or his sureties be eased or exempted from their full liabilities to forfeitures for non-fulfillment of the contract as before specified in failure or inadequacy of additional security offered by assignees: *Provided*, It shall not be lawful for said Company to use their funds or any part thereof, in any banking or brokerage, or in buying or selling bank notes or bills of exchange, or in any other business whatever, except that especially provided for by this act, and the acts referred to herein.

SEC. 11. The said commissioners, in entering into the contract for the construction of said canal, shall provide that the railroad at present existing across the Portage, be in no way unnecessarily interrupted during the progress of the work; and said commissioners shall have power to decide the necessity of any interruption; and the said commissioners may, at the expense of the said railroad company, re-locate said railroad, if they shall deem it necessary to aid and promote the construction of said canal.

This act shall take effect immediately.

Approved February 5, 1853.

## LAWS OF MICHIGAN, 1853.

### NO. 61. PAGE 86.

*An Act supplementary to an act to provide for the construction of a ship canal around the Falls of St. Mary's, approved February fifth, eighteen hundred and fifty-three.*

SECTION 1. *The People of the State of Michigan enact*, That the commissioners appointed under an act to provide for the construction of a ship canal around the Falls of St. Mary's, approved February fifth, eighteen hundred and fifty-three, are hereby authorized, in case they shall find it impracticable to let the contract for the construction of said canal on terms which will secure its completion according to the provisions of said act, in their discretion, to contract that any taxes to be assessed on the lands donated for that purpose shall be remitted to the person or persons taking such contract, for a period not exceeding five years from the time fixed for the completion of said canal: *Provided*, That when any of said lands shall be sold by the contractors to any other persons the same shall thereafter be subject to taxation as in other cases.

SEC. 2. For the purpose of carrying out the provisions of the foregoing section, the Auditor General is hereby required, upon satisfactory evidence that any of said lands are held by such contractors and have not been sold by them, to receipt the amount of any such taxes assessed within the period fixed upon in such contract, and returned to his office for non-payment, and to charge the amount thereof to the general fund: *Provided*, That the amount so charged to the general fund may be reimbursed to the State from tolls upon said canal, in such manner as shall be provided by law, in case said amount shall not be reimbursed by the United States government.

This act shall take effect immediately.

Approved February 12th, 1853.

*An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits.*

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted to said State.

SEC. 2. *And be it further enacted*, that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the Governor of the State of Arkansas, and at the request of said Governor cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively as far as necessary to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, that in making out a list and plats of the land aforesaid all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted*, that the provisions of this act be extended to and their benefits be conferred upon each of the other States of the Union in which such swamp and overflowed lands known as designated as aforesaid may be situated.

Approved September 28, 1850.

*An Act granting to the State of Michigan the Right of Way and a Donation of Public Land for the construction of a ship canal around the Falls of St. Mary's, in said State.*

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That there be, and is hereby, granted to said State the right of locating a canal through the public lands, known as the military reservation at the Falls at St. Mary's River, in said State; and that four hundred feet of land in width extending along the line of such canal be, and the same is hereby granted, to be used by said State, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances thereto, and the use thereof is hereby vested in said State forever, for the purposes aforesaid, and no other; *Provided*, That in locating the line of said canal through said military reservation, the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said falls, as, under the approval of the Secretary of War, may be selected. *And provided further*, That said canal shall be at least one hundred feet wide, with a depth of water twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide.

SEC. 2. *And be it further enacted*, That there be, and hereby is granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing said canal, seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeable to the United States surveys, by an agent or agents to be appointed by the Governor of said State, subject to the approval of the Secretary of the Interior, from any land within said State, subject to private entry.

SEC. 3. *And be it further enacted*, That the said lands hereby granted, shall be subject to the disposal of the Legislature of said State for the purpose aforesaid and no other; and the said canal shall be, and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said goverment engaged in the public service, or upon vessels employed by said government in the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted*, That if the said canal shall not be commenced within three and completed within ten years, the said State of Michigan shall be bound to pay to the United States, the amount which may be received upon the sale of any part of said lands by said State, not less than one dollar and twenty-five cents per acre, the title to the purchasers under said State remaining valid.

SEC. 5. *And be it further enacted*, That the Legislature of said State shall cause to be kept, an accurate account of the sales and

net proceeds of the lands hereby granted and of all expenditures in the construction, repairs and operating of said canal, and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior, and whenever said State shall be fully reimbursed for all advances made for the construction, repairs and operating of said canal, with legal interest on all advances, until the reimbursement of the same, or upon payment by the United Stotes, of any balance of such advances over such receipts from said lands and canal, with such interest, the said State shall be allowed to tax for the use of said canal, only such tolls as shall be sufficient to pay all necessary expense for the care, charge and repairs of the same.

SEC. 6. *And be it further enacted*, That before it shall be competent for said State to dispose of any of the lands to be selected as aforesaid, the route of said canal shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office.

Approved August 26, 1852.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No. 202.

**JOSEPH H. CHANDLER, Plaintiff in Error,**

*vs.*

**THE CALUMET AND HECLA MINING COMPANY,**

**Defendant in Error.**

In Error to the Circuit Court of the United States for the Sixth Circuit, Western District of Michigan, Northern Division.

## Brief in Reply for Plaintiff in Error.

**FRANK E. ROBSON,**
**JAMES K. REDINGTON,**
**J. M. WILSON,**
**Attorneys for Plaintiff in Error.**

McGILL & WALLACE, Printers, 1107 E St. N. W., Washington, D. C.

IN THE

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*vs.*

THE CALUMET AND HECLA MINING COMPANY, Defendant in Error.

October Term, 1892.
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**In Error to the Circuit Court of the United States for the Sixth Circuit, Western District of Michigan, Northern Division.**

SUPPLEMENTAL BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

Since the filing of the brief for plaintiff in error counsel have had the advantage of reference to briefs filed for the defendant in error, one signed by Mr. Ashly Pond and one by Mr. Thomas L. Chadbourne. An examination of the brief of Mr. Pond shows that while he states various propositions, yet they all come back to one proposition, to wit, that as the Secretary of the Interior had identified lands in various parts of the State as swamp lands, and has never identified these lands in controversy as swamp lands, therefore the Secretary has acted in respect of identification, and that all not identified are necessarily to be regarded as not swamp lands. The same proposition is urged in the brief filed by Mr. Chadbourne. Mr.

Pond in his brief makes no argument on the question as to whether or not the State is estopped by reason of the selection of the lands as canal lands. Mr. Chadbourne urges this estoppel in his brief.

Addressing ourselves to these two questions, as above stated, for defendant in error, we desire to add to what we have already said in our openning brief the following:

**The Claim of Adjudication by the Secretary.**

In answer to the first of the propositions above mentioned, in addition to what we have said on this subject in our opening brief at pages 24, 38, 39, 40, and 41, we beg to submit—

(*a*) It is to be borne in mind that by the act of 1850 the duty was imposed upon the Secretary of the Interior to ascertain what were swamp lands, and thus to identify them. There was no duty resting upon the State in that regard. In the discharge of this duty the method pursued was for the Surveyor-General to make out lists from time to time and send them to the Secretary for his approval, and the Secretary in turn made lists which he certified to the State. These lists embraced lands in the several land districts of the State (Commissioner's Report for 1852, p. 102), and from year to year the Surveyor-General added to the lists, certified these additions to the Secretary, and the Secretary certified additional lists to the State as above mentioned. This was continued from 1852 to 1857, when the office of the Surveyor-General in the State of Michigan was closed.

The fact that the lists were thus prepared from time to time is evidenced by the Commissioner's Report of 1853, from which it appears that there were returned by the Surveyor-General as swamp 6,788,124.72 acres. In 1855 the Surveyor-General had added to the selections theretofore made 485,600 acres.

Commissioner's Report for 1853, p. 45;
Commissioner's Report for 1855, p. 144.

The Secretary at various times certified to the State portions of the lands thus returned by the Surveyor-General. This is illustrated by the certifications as follows:

Prior to and including 1855, 5,465,232.40 acres.
Commissioner's Report for 1855, p. 144.

In 1861, 193.33 acres.
Commissioner's Report for 1861, pp. 42, 496.

In 1862, 299.60 acres.
Commissioner's Report for 1862, pp. 36, 58.

In 1863, 17,146.06 acres.
Commissioner's Report, p. 40.

In 1865, 71,332.40 acres.
Commissioner's Report for 1865, p. 60.

In 1866, 208,646.26 acres.
Commissioner's Report for 1866, pp. 68, 428.

In 1868, 80 acres.
Commissioner's Report for 1868, p. 272.

In 1869, 160 acres.
Commissioner's Report for 1869, p. 244.

In 1870, 120 acres.
Commissioner's Report for 1870, p. 306.

In 1871, 80 acres.
Commissioner's Report for 1871, pp. 316, 348.

In 1873, 1,547.87 acres.
Commissioner's Report for 1873, p. 276.

In 1874, 840 acres.
Commissioner's Report for 1874, p. 286.

In 1875, 19,023.61 acres.
Commissioner's Report for 1875, p. 400.

In 1876, 6,910.08 acres.
Commissioner's Report for 1876, p. 154.

In 1877, 36.41 acres.
Commissioner's Report for 1877, p. 186.

In 1878, 680 acres.
Commissioner's Report for 1878, page 166.

In 1880, 120 acres.
Commissioner's Report for 1880, p. 222.

In 1881, 778.10 acres.
Commissioner's Report for 1881, p. 210.

In 1882, 280 acres.
Commissioner's Report for 1882, p. 108.

In 1883, 158.95 acres.
Commissioner's Report for 1883, p. 81.

In 1884, 40 acres.
Commissioner's Report for 1884, p. 66.

In 1885, 5,011.25 acres.
Commissioner's Report for 1885, pp. 214, 366.

In 1886, 1,200.72 acres.
Commissioner's Report for 1886, p. 354.

In 1887, 257.26 acres.
Commissioner's Report for 1887, pp. 365, 447.

In 1891, 612.59 acres.
Commissioner's Report for 1891, pp. 13, 198.

What we have here stated is sufficient to refute the contention of the other side so far as the administration of the Land Office could refute it; because, if their contention be sound, then when the Surveyor-General reported a list of lands to the Secretary and the Secretary sent an approved list to the State, that, according to the contention of the other side, would amount to an exclusion of all the lands not thus certified to the State. And if that contention is sound, then the Secretary, after having exhausted his powers in that regard, has been certifying from year to year lands as swamp which he had already adjudged not to be swamp. But, as appears from what we have above stated, although the

lands certified by the Surveyor-General to the Secretary were situated in the various land districts, we find the Secretary from time to time certifying to the State as swamp lands individual tracts not embraced in his former certifications. And there yet remain uncertified to the State, in round numbers, a million and a half of acres that were reported as swamp to the Secretary by the Surveyor-General and that appear by the plats and field-notes to be swamp lands.

Commissioner's Report for 1892, p. 282.

As to all of this land under the contention of our adversaries the State would be barred by reason of the fact that in the first certification they were not embraced.

In addition to this it will be observed that the Secretary has certified to the State in round numbers 20,000 acres that never were reported to the Secretary by the Surveyor-General as swamp lands.

Report of 1880, pp. 222, 626, 80 acres;
Report of 1881, p. 210, 40 acres;
Report of 1885, pp. 214, 366, 14,019.10 acres;
Report of 1886, p. 384, 5,295.46 acres.

It thus appears that from the beginning of the administration of this act down to the present time the interpretation of the act by the official whose duty it was to administer it has been in accord with our contention, and it is in direct conflict with the contention which we are resisting, to-wit, that when the Secretary made his certificate to the State that certain lands were swamp he thereby adjudged or found that all others were not swamp.

The above facts are shown by official reports of which this court will take judicial notice.

Jones *v.* U. S., 137 U. S., 202;
Heath *v.* Wallace, 138 U. S., 573–584.

In the case of Railroad Company *v.* Smith (9 Wall., 95), cited in our original brief, exactly the same condition of fact, as to the certification of swamp lands to the State, existed relative to Missouri as are here found in respect to the State of Michigan. In Missouri, when that case was presented to this court, the Secretary had in part and in part only identified the swamp grant inuring to the State, and had in part only certified it to her. All this will be seen by reference to the same pages of the Commissioner's reports to which we have referred above. In other words, the two cases are on all fours in respect to the condition of the swamp grant as to its identification and certification by the Secretary.

**The Question of Estoppel.**

We turn now to the second point urged in Mr. Chadbourne's brief, although not mentioned in the brief of Mr. Pond.

In our original brief we have at considerable length shown, in separate and distinct paragraphs, various reasons why the doctrine of estoppel can not be invoked on behalf of the defendant in error in the case at bar. At the time of the preparation of this brief we were without the advantage of any citation of authorities by our opponents, no brief having been filed by them in the court below. We now, by the brief of Mr. Chadbourne above mentioned, are referred to certain authorities upon which he is understood to rely in advancing the doctrine of estoppel.

An examination of these authorities will show that none of the cases support the position contended for, and that none of them are properly applicable to the case at bar.

Of the thirteen cases referred to in said brief all but five, although cases of estoppel, upon the most cursory examination are seen to proceed upon entirely different

facts and circumstances from those of the case at bar, and are obviously inapplicable. The five cases which perhaps form some exception to the above suggested rule of transparent inapplicability are:

Cahn *v.* Barnes, 5 Fed. R., 326;
Pengra *v.* Munz, 29 Fed. R., 830;
Hough *v.* Buchanan, 27 Fed. R., 328;
State *v.* Milk, 11 Fed. R., 389;
State *v.* Railroad Co., 89 Mich., 481.

The two cases first mentioned arose in the Oregon circuit and were there decided by Mr. Justice Deady. An examination of the opinions there rendered, and particularly that in Pengra *v.* Munz, show that the application of the doctrine of estoppel proceeded entirely upon the theory that the swamp land grant did not vest in the State until identification by the Secretary of the Interior. As this position is directly in conflict with repeated decisions of this court cited in our original brief, it is obvious that the opinions themselves can not be considered sound authorities upon the doctrine of estoppel in support of which they are cited.

In addition, the other doctrines enunciated in Cahn *v.* Barnes, in respect to the effect to be given a conveyance by the United States subsequent to the swamp grant, are directly repudiated by this court in Wright *v.* Roseberry, where Cahn *v.* Barnes was expressly cited and relied upon.

As to the other three of the five cases above mentioned, we can only in the space to which this brief must necessarily be limited, say that each one of them has well-defined features distinguishing it from the case at bar, and that in each of them elements of estoppel appear, which are not found in the case under consideration. And even if this were otherwise and any support whatever could be found in these cases for the proposition contended for, then we say that they are in

direct and positive conflict with the decisions of this court in the cases of Smith *v.* Railroad Co. (9 Wall., 95), and French *v.* Fyan (93 U. S., 169), and also in direct conflict with the opinion of Mr. Justice Jackson in Canal Co. *v.* Cunningham (44 Fed. R., 819). This last mentioned case presented facts almost identical with the case at bar. The doctrine of estoppel was invoked by the plaintiff as against the defendant, who therein set up in defense of an action of ejectment a claim that a title in the State existed of senior date to that held by the plaintiff. And the court, by Mr. Justice Jackson, emphatically held that the doctrine of estoppel did not apply; that the plaintiff company was chargeable with notice of the prior title in the State, and that defendant could show that title in defense of the action.

The fact that the premises in controversy were taxed by the State is not sufficient to sustain the claim of estoppel. This has been directly decided by the following State cases:

Crane *v.* Reeder, 25 Mich., 303–320;
Hays *v.* McCormick, 49 N. W. Rep., 69.

In the first above-mentioned case the court say:

"The doctrine that the State would waive its rights to its lands, or estop itself from claiming them, by taxing them to an occupier and taking proceedings to enforce payment of taxes, would be rather startling to officers having charge of the public domain, and would indicate an easy mode in which trespassers might convert their trespass into a complete ownership.

* * * "If we inquire, in this case, what the State has done which has misled or deceived Reeder, it will hardly be replied that taxing the land to him could have that effect by making him suppose the land his own, for taxation does not imply ownership in the person taxed, and if it did we could not presume the party himself to be so ignorant of his rights as to be deceived by it."

At another point in the brief now being referred to counsel is understood to contend that the title of plaintiff is void because the premises in controversy were never offered by the State of Michigan to the highest bidder at public sale under her laws. This objection is fully disposed of by several decisions of the Supreme Court of the State passing directly upon this point and directly upon the act of the State legislature under which plaintiff in error claims. In these cases the court holds that lands situated as were these in controversy could be located or assigned whether the same had been previously offered at public sale or otherwise, and irrespective of the question whether they had been patented by the United States to the State.

Houghton County *v.* Commissioner, 22 Mich., 270;
State of Michigan *v.* Sparrow, 89 Mich., 270.

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# Supreme Court of the United States.

**OCTOBER TERM, 1892.**

*No. 202.*

JOSEPH H. CHANDLER, PLAINTIFF IN ERROR,

*vs.*

THE CALUMET AND HECLA MINING COMPANY,
DEFENDANT IN ERROR.

## Supplemental Brief for Defendant in Error.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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JOSEPH H. CHANDLER, PLAINTIFF IN ERROR,

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THE CALUMET AND HECLA MINING COMPANY,
DEFENDANT IN ERROR.

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## Supplemental Brief for Defendant in Error.

The brief for counsel for plaintiff in error was not filed until after this case was on call, and hence we had no opportunity to examine it until after our original briefs were necessarily in print; hence this supplemental brief.

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The argument contained in said brief, when analyzed and summarized, seems to affirm and rest in great part upon propositions which we proceed to state as concisely and consider as briefly as seems practicable, to wit:

I. That the act of September 28, 1850, was a grant *in presenti*; that is that it passed to the State, when accepted,

as of the date of its approval, all undisposed-of lands, within the State, of the character described in the act.

Against this proposition, when coupled with the further proposition that that act provided a tribunal charged with the duty of identifying the lands which were of the character granted, we need make no contention.

---

II. That by the statutory acceptance of the proposition contained in the letter of the Commissioner of the General Land Office to the surveyor general, a copy of which is found in the record, the State became entitled to all lands which the surveyor general, or the Secretary of the Interior, should upon the evidence of the field-notes and the plats, construed in accordance with the *formula* contained in said letter determine to be of the character granted by said act.

Against this proposition we need make no contention except in so far as it relies upon a determination by the surveyor general. The surveyor general, we submit, had no power to make any determination except as hereinafter indicated.

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III. That the State also became entitled to all lands which the surveyor general or the Secretary of the Interior should, by any other evidence, determine to be of the character of the lands granted by the act.

While this proposition may be open to controversy it is not necessary that we should make contention against it, except as to the alleged effect of a determination by the surveyor general, as to which we reassert what we have said above.

IV. That the acceptance by the State of the proposition contained in the said letter of the Commissioner of the General Land Office, to the surveyor general, to make the field-notes and plats the basis of the identification of lands, did not operate to bind the United States and the State, or perhaps either of them, to adhere to that method for the identification of lands which would pass under the grant mentioned. That they were, by mutual consent, and perhaps either, without the consent of the other, was, at liberty to recede from that method at pleasure, and adopt some other method.

Upon this proposition, as above stated, rests substantially the entire superstructure of counsel's argument.

Now, it is unnecessary for us to contend that this proposition is absolutely and wholly false in its entirety. It is sufficient for our case to insist, and we do insist, that to the extent, territorially, that such method was adopted and followed, and the result accepted and permitted to remain unquestioned, either by the United States or the State, until after rights of third parties had intervened, such result could not *thereafter be repudiated and another method of identification adopted to the injury of such third parties.* Such is what is attempted to be done here, as we proceed to show.

The acceptance by the State of the proposition contained in said letter was, of course, an assent to the scheme or method there outlined for the identification, by the field-notes, of the lands which would pass under said grant.

That method was this, to wit: The surveyor general was to examine the field-notes and plats of the several townships within the State, and, construing such field-notes in

accordance with the instructions contained in said letter, make lists of the lands which he should determine the State to be entitled to under said grants, and to forward said lists to the Interior Department for action by the Secretary, who was to be controlled by them in making up lists, to be sent to the governor as the basis for the issue of patents.

This method was strictly followed with reference to the townships mentioned in the list, which included the townships containing the land in controversy, as will be seen by what follows, to wit:

It appears by the record that under date February 12, 1853, the surveyor general made a list of lands within certain townships, including the township containing the land in controversy in this suit, but not including said land, and attached thereto the following certificate, to wit:

"I certify that the foregoing is a correct list of the swamp lands in the townships herein enumerated, made up in conformity with the instructions of the Commissioner of the General Land Office."

Note in this connection that by said letter of the Commissioner of the General Land Office the surveyor general was instructed as follows, to wit:

"You will please make out a list of all the lands thus granted the State, designating those which have been sold or otherwise disposed of since the passage of the law, and the price paid for them when purchased."

Now, construed in the light of this instruction, the certificate of the surveyor general to this list is a declaration that such list contains *all* the land in the townships mentioned, which he finds to be swamp by the field-notes and plats,

construed in accordance with the instructions of the Commissioner of the General Land Office.

This list the surveyor general forwarded to the General Land Office, and under date of January 11, 1854, a list, which a comparison demonstrates to be identical with said surveyor general's list, was approved by the then Secretary of the Interior, and, under date of February 22, 1854, a copy of said list was certified by the Commissioner of the General Land Office, to the governor of Michigan. (Record, pp. 34–38.)

Now, from that time until November 23, 1887, the date of the patent of the land in controversy issued by the governor of the State to plaintiff in error, so far as appears in the record, (and such is unquestionably the fact), no suggestion or intimation was ever made, either on behalf of the United States or on behalf of the State, that the said grant of September 28, 1850, was not, so far as the townships in said list mentioned were involved, fully adjusted by such action between the United States and the State.

Meantime under date of January 4, 1855, the then Secretary of the Interior certified to the State a list of lands which had been selected by an agent of the State as inuring to it under the grant of 1852, to aid in the construction of the St. Mary's Falls canal, *which included the land in controversy here*, and under date of August 26, 1855, a patent from the State for such lands was issued to the contractors for the construction of such canal, in compliance with the contract in that behalf, which had been entered into under authority of an act of the legislature of the State, and defendant had succeeded to the title of said grantees to the State, and

taxes upon said lands had been paid to the State for twenty-seven years before it issued its patents to plaintiff.

We submit, therefore, that beyond possible question, it is too late for the State to even plausibly insist, that the adjudication, made in accordance with the said scheme or method outlined in said letter of the Commissioner of the General Land Office to the surveyor general, to which it assented, should be now opened, and *a different method* for identification of additional lands adopted, to the *injury of the defendant.*

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It must be borne in mind in this connection that the Secretary of the Interior had, prior to including the land in controversy in the Canal land list, already excluded it from a list of lands covering the same township, made under the act of September 28, 1850, and it is that action on his part that we contend adjudicated the land in controversy not to be swamp, within the intent of that act. And it is that adjudication that we insist is not open to attack.

Note here that the surveyor general's list of swamp land, covering the township in question, bears date February 12, 1853, (Record, pp. 35 and 36); the Secretary of the Interior's approved list bears date January 11, 1854, (Record, pp. 36, 37 and 38,) and the Canal list January 24, 1855 (Record, p. 30).

Under this state of facts, if it could be held that the exclusion by the Secretary of the land in question from the swamp-land list was not an adjudication that that particular tract was not within such grant, then we can well contend that his inclusion of it in the list made under the canal-land grant was a specific adjudication upon that identical tract. With reference to the making of the last-mentioned list, the State, as we hereinafter show, was represented by its agents, to wit, the persons appointed to select lands under said canal grant.

If the Secretary had not already adjudicated with reference to the character of the land in controversy, as swamp or otherwise, he was *then* called upon to do so specifically, and, if he *then* found it to be swamp, to exclude it from said canal list; and the presumption must be that he either ruled that its character had already been determined by its exclusion from the swamp-land lists covering the townships which contained it, or that he then made the necessary examination and adjudged it *not* to be swamp. The question was one of fact, and hence his determination of it is conclusive against collateral attack.

We have thus here two adjudications by the Secretary: one by *exclusion*, and another by *inclusion*, and hence affirmative and specific.

It is argued by counsel for plaintiff (see their brief, p. 65) that the defendant would suffer no injury by being deprived of the land in controversy, for the reason that its grantor can, as they assert, select other land in lieu of such land. This is clearly fallacious. The right now to select under such grant of 1852 is a barren right, even if its exercise is practicable or possible. There are no lands of any

value from which selection can be made; see opinion of the supreme court of Michigan, The State *vs.* F. & P. M. R. R. Co., 89 Mich.

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We might well stop here, because when the foundation of the argument of counsel falls, the entire superstructure falls with it, but there are some further propositions put forward by counsel for plaintiff which it will do no harm to notice. The first of such propositions in order is the following, to wit:

That a failure of the surveyor general or the Secretary of the Interior to include in a list, made by the surveyor general or said Secretary, a particular subdivision of land cannot be construed as a determination that such subdivision is not of the character of the land granted by said act.

The position taken in support of this proposition appears by the following extract from p. 30 of the brief of counsel for plaintiff in error:

"We do not deny the general proposition that the Secretary of the Interior was created by the act of 1850 a special tribunal, with jurisdiction to determine the character of the lands to enure to the State under that grant, and that when he has once finally acted upon a particular case duly and properly presented, his decision is conclusive as a finding of fact. This is undoubtedly the law, no matter whether the field-notes were accepted or not as a basis of adjudication, and no matter what character or class of evidence was submitted to and considered by him. But we do insist that when in respect to a particular tract the Secretary has never so acted, or where he has refused or neglected to so act, or where from circumstances other than those affecting the character of the land, he is deprived of the power to act, then the State, whether she has accepted the field-notes or

otherwise, is entitled in judicial proceedings wherever material, to show the character of the land by parole evidence."

This proposition at once suggests several questions, to wit:

(A) Under what circumstances can it be held that the Secretary has never acted with reference to a particular tract of land?

It seems clear that when he has made a list covering a certain territory, such as a State, land district, county or township, and has not included in such list a particular tract, he has acted with reference to such tract, and determined it not to be of the character of the land granted.

The result of the contention of the counsel for plaintiff in error upon this point seems to be, and we submit is, that the only evidence that the Secretary of the Interior has adjudicated with reference to the character, as swamp or otherwise, of any particular tract, must be found in some written record or document *specifically naming such tract.*

With all due deference we submit that such a contention is absurd; for if sound, the grant can never be held adjudicated until the Secretary can be shown to have passed specifically upon each and every subdivision,—practically upon every forty-acre tract within the State; and this it is evident he can never possibly do. We have discussed this question in our original brief and do not deem it necessary to say anything more here.

(B) What amounts to a refusal of the Secretary to act with reference to a particular subdivision of land? Does the mere fact that he has not included such subdivision in any

list prove, either conclusively or *prima facie*, that he has refused or neglected to act with reference to said subdivision?

We submit that it has no tendency so to prove. Our position on this question is covered by our answer to the last above question.

(C) What circumstances other than those affecting the character of the land would deprive the Secretary of the power to act with reference to a specific tract, and entitle the State, in judicial proceedings, to show the character of the land by parol evidence?

The circumstance upon which counsel for plaintiff in error seem to rely in this case, is the alleged fact that before the State had an opportunity to call the attention of the Secretary of the Interior to the particular tract in controversy that official had certified such tract to the State as inuring to it under the act of 1852, granting land to the State in aid of the construction of the St. Mary's Falls canal.

The learned counsel, it seems to us, show the fallacy of this position by their own argument, and by the cases upon which they rely. They argue, and cite cases to sustain their argument, that the action of the Secretary of the Interior in issuing a patent for land, the title to which had already passed out of the United States, is absolutely void; and they also quote an act of Congress, which declares that a list made by the Secretary of the Interior which includes land not within the grant upon which such list is based, is absolutely void as to the land not so within the grant; but as we understand the decisions of this court, where a patent has been issued for land the title to which has already

passed out of the United States, or a list made, which includes land not within the grant upon which such list is based, the Secretary of the Interior can disregard such patent or such list and issue a patent to the party entitled, and such patent will, in an action of ejectment, prevail over the former patent or list. Such, it seems to us, the recent case of *Noble et al.* vs. *The Union etc., R. R. Co., Sup. Court Rep., Feb.* 1, 1893, *p.* 269, concedes to be the law.

Now, applying that principle to this case; if the title to the land in question, as counsel for plaintiff contend, was already vested in the State under the act of September 28, 1850, before it was included in the St. Mary's Canal list, the action of the Secretary of the Interior in including it in such list was absolutely void and did not prevent him from listing the same to the State as swamp land and issuing a patent thereon.

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Counsel for plaintiff further contend, under the facts as they appear in the record the plaintiff in error was entitled (1) To have the field-notes and plats submitted to the jury and to have their determination whether, when read and construed in accordance with the formula contained in the letter of the Commissioner of the General Land Office to the surveyor general, such field-notes and plats did not show that such lands in controversy were of the character described in said act of September 28, 1850. (2) To have the parol evidence offered as to the character of said land in controversy, submitted to the jury.

As to the first of these two propositions it would seem sufficient to say that it is the province of the court, and not

of the jury, to construe written evidence; and as we contend in our original briefs that the court was not bound to construe the field-notes and plats in accordance with any agreement which the Secretary of the Interior may have made to control his own action. But we may add that the result of the contention of the plaintiff in error in this regard would, in effect, give the jury power to review the determination of the surveyor general, and of the Secretary of the Interior, as to what was proven by said field-notes and plats, construed according to the said formula.

It should be noted in this connection that the plats are on a very small scale, and it will be at once seen that in many cases it would require very exact measurement to draw the required lines, and very accurate computation to determine whether more or less than one-half of a particular subdivision or tract was included within such lines, even if this were a case where the application of the formula given in the letter of instructions was to apply, which we deny. (See argument on that point in the original brief of Mr. Chadbourne.)

An examination of the plat contained in the record, with reference to the section in which the land in controversy is included, namely: section 23, will illustrate to your honors the accuracy required in this particular case to determine whether the tract in controversy is shown by the lines there drawn, to be more than half swamp.

The proposition that the oral evidence offered should be admitted, is sufficiently answered by our original briefs, and by what we have hereinbefore said. However, to what is so said may be added: That all the cases heard in this Court, in which it has been held that oral testimony as to the char-

acter of the lands in controversy is admissible, have been cases originating in States other than those which adopted the field-notes as the basis of identification; that is, in Missouri, Iowa, Louisiana and California, States where no uniform or consistent means were provided for identification, in consequence of which fact the Secretaries of the Interior neglected or declined to make the identification to any considerable extent,—did not make it except perhaps in isolated instances and on special application.

This fact is forcibly stated in the opinion of this Court in *French* vs. *Fyan*, thus:—"The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever." (See plaintiff's brief, pp. 17 to 21.)

In Michigan, the Secretary, having a basis agreed upon between the United States and the State, which would enable him to select and list the greater part, if not all, of the lands described in the swamp-land act, did accordingly make lists purporting to cover the whole State and to be a complete segregation of the swamp lands in it. That certainly was the case in the township in question here, so that the situation of States not excepting the field-notes, but reserving the right in any manner they saw fit indefinitely to receive the lands, and of States adopting these notes as the basis, was entirely different; and the effect of the Secretary's act in listing the lands in Michigan would or might therefore be quite different from the effect of his action in listing *some* of the swamp lands in Missouri, for instance.

The claim of Michigan, and the only claim, appearing by

the record, for unlisted swamp lands, is for lands on the *basis of the field-notes;* for none does she make claim as swamp, *in fact.* Record, pp. 22 and 23.

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In dealing with the question of estoppel, the plaintiff's brief erroneously both assumes and states, in various places, that the lands accruing to the State under the canal grant were selected by the agents of the *contractors.* See plaintiff's brief, p. 47.

But there is no evidence in the case that the canal company even recommended for appointment the agent who selected the land in question, or any agent.

The governor of the State was to appoint agents recommended by the contractors, if in his judgment they were suitable persons therefor; he could appoint, and may have appointed, agents not so recommended, and the agent in question may have been such an one.

The act of Congress provided that the agent should be appointed by the governor of the State, and therefore in behalf of the State.

Indeed the truth is, that the State *had* a direct interest in the grant and might have made a profit out of it, although plaintiff's brief (at page 44 and other places) erroneously assumes the contrary to be true.

Thus the State was at liberty to sell the lands and build the canal with the proceeds. Had the State sold the lands say for $1,500,000 and built the canal at a less cost, say $1,000,000, the profit would have been its own. There was no provision whatever in the act whereby in such a case the

State would have been called upon to hand over its profits to the General Government. (See section 5 of the act, Mr. Chadbourne's brief, p. 22.)

It is true the State paid the lands for the canal, but this does not affect the question now in discussion, since if the contractors had failed to build the canal, had become unable to carry out their contract, the State might *then* have built it directly, and profited by any surplus of the proceeds brought by the land over the cost of building.

The State then was not a "mere trustee," but was interested, in the beginning and throughout the transaction; in the beginning, because, as shown, it might have sold the lands, thereby profiting if the cost of the canal should be less, and because if the contractors had failed to complete the contract or carry it out, the State might have abandoned paying the lands for the canal, sold the lands, and itself completed or built the canal at a profit.

The State had throughout the transaction at least a contingent interest.

The case therefore, in this respect, differs from the case of the *Lake Superior Ship Canal and Iron Company* vs. *Cunningham, Fed. Rep.* 119, cited in plaintiff's brief. In that case the agent appointed was the president of the canal company and it is that fact upon which Justice Jackson comments in his opinion. Other radical differences distinguishing that case from this as to the question of estoppel, we need not stop to point out, since they are obvious.

There was reason then for making the agents for selection

of the lands the agents of the State, and they were the agents of the State.

Other misstatements or misapprehensions of fact in plaintiff's brief may be noted here.

The brief states that the State of Michigan "was without any memoranda," to determine for itself the character of the parcel in controversy, because the field-notes "were not in its possession until February 6, 1860."

Plaintiff's brief, p. 48.

It seems to be forgotten that these documents, the field-notes and plats, were public records entirely accessible to the State and its agents.

In this connection the opinion of the court in the F. & P. M. R. R. Co., 89 Mich., at page 493, is apt, as follows:

"It is urged by counsel for the State that none of its officers or agents examined or knew of the contents of these field-notes, and that this constitutes a legal excuse for not applying to it the doctrine of estoppel. The State, therefore, seeks to apply the doctrine of estoppel to the railroad company and its grantees, but denies that it is applicable to itself."

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A large number of cases are cited on the brief of counsel for plaintiff in error, most of which we have examined; but we see no reason for making specific comment on more than one or two of them, since the facts at bar make them inapplicable.

The opinions of the Secretaries of the Interior on the question whether, in the States which adopted the field-notes as the basis of identification, resort may be had to other means of identification, are greatly in conflict, some holding that the State may not, and some that it may, depart from the basis of the field-notes.

See the land decisions cited in plaintiff's brief (pp. 33–37).

In addition to these, see a ruling later than any of them :

"* * * the State adopting this method is bound thereby until such survey shall be found to be fraudulent."
Sec'y Noble, Sept. 30, 1891, Rake *v.* Iowa, 13 L. D., 344.

But this question not being material in our case, will not be further pursued.

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In conclusion :

The positions taken in the brief in behalf of the plaintiff in error, in view of facts there asserted, and of facts which appear in the record, are somewhat startling to say the least.

Such facts show that long prior to the issue of its patent by the State to the plaintiff, of the land here in controversy, the State had received under the grant of September 28, 1850, as swamp and overflowed, and thereby unfit for cultivation, over 5,600,000 acres, nearly one-sixth of all the land within its limits, and that now, after more than forty years since the date of said grant, it lays claim under said grant to 1,600,000 additional acres. Just when it received the patents which it received for said 5,600,000 acres, does not ap-

pear; but if your honors, as we understand, from the authorities, you are at liberty to do, should examine the records and files of the General Land Office, your honors will discover that the State received patents for a very large portion of said 5,600,000 acres as early as the year 1856, and for all except an insignificant amount, not later than the year 1867, twenty years before the issue by the State of the patent under which plaintiff in error claims title to the land in controversy.

And your honors will also discover that almost every, if not every, acre of the 1,600,000 acres now claimed by the State, has long since been disposed of by the United States, the most of it to *bona fide* cash purchasers; and yet if counsel for plaintiff are right in their contention here, the titles so held are not worth the paper upon which they are written.

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It should be noted here that there is no evidence in this case that the State ever laid claim to the land in controversy here as enuring to it under the grant of 1850, until the issue of its patent therefor to the plaintiff in error November 23, 1887, or that it has ever made such claim in any other manner than by the issue of such patent.

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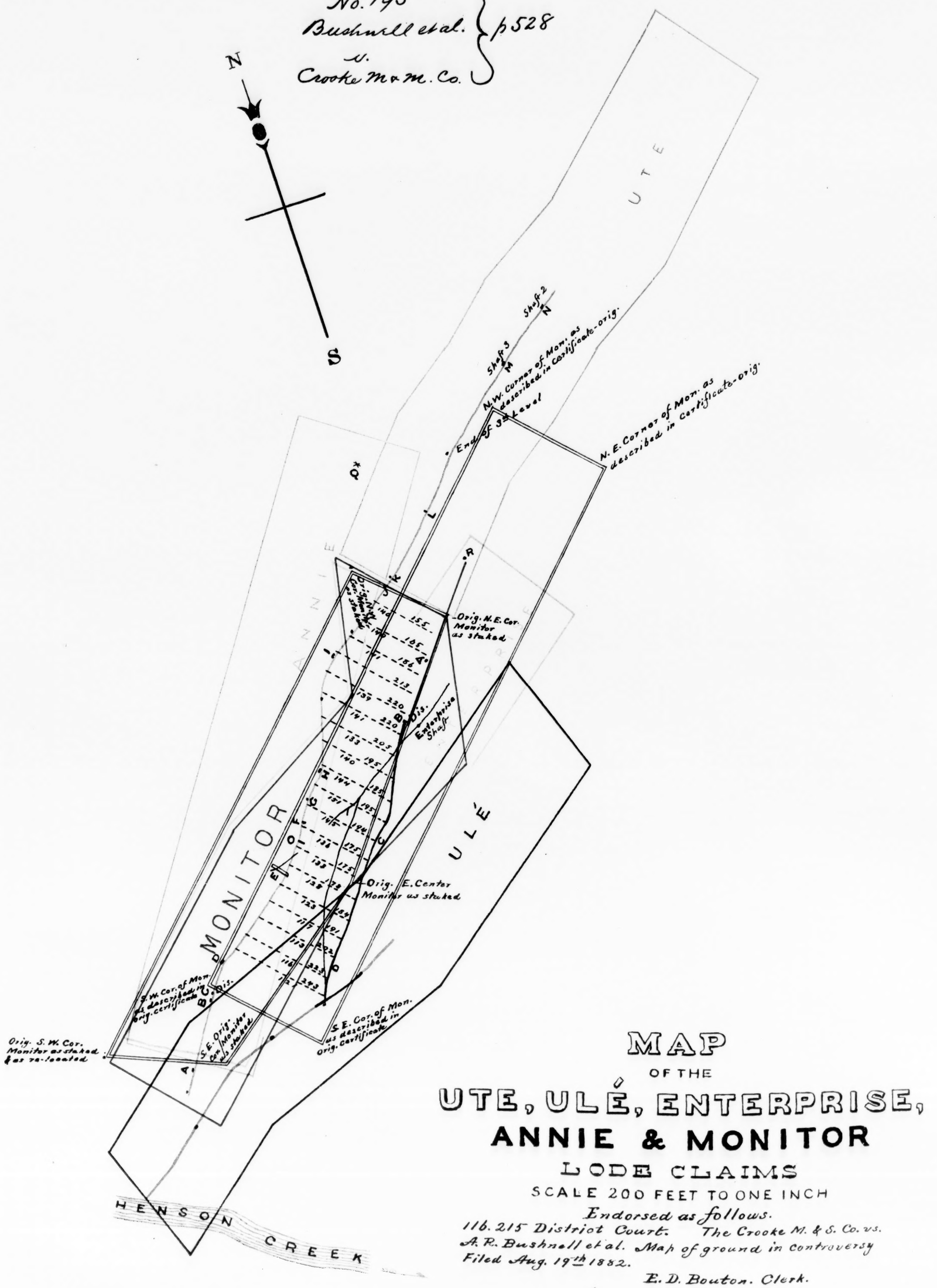
The opinion of the supreme court of Michigan with reference to the State's claim to a portion of said 1,600,000 acres, will be found in the case of the *State* vs. *The F. & P. M. R. R. Co.*, 89 Mich., 481. The court (p. 494) de-

clares the State's claim to the land there in controversy to have "no foundation in equity, justice, or good conscience," and holds the State estopped to claim such lands. And your honors will also find some interesting and instructive reading on the general subject of the State's claim, in an opinion of ex-Secretary of the Interior Vilas, (*7th Public Land Decisions*, 574.)

T. L. CHADBOURNE,
ASHLEY POND,
*Counsel for Defendant in Error.*

No. 195
Bushnell et al. } p528
v.
Crooke M & M. Co.




# MAP
OF THE
# UTE, ULÉ, ENTERPRISE, ANNIE & MONITOR
## LODE CLAIMS
SCALE 200 FEET TO ONE INCH

*Endorsed as follows.*
*116. 215 District Court. The Crooke M. & S. Co. vs. A. R. Bushnell et al. Map of ground in controversy Filed Aug. 19th 1882.*
*E. D. Bouton. Clerk.*

(EXHIBIT "Z")

A.D. 1843. May 25. N 744.
GALLOWAY'S SPECIFICATION.

(3 SHEETS.)
SHEET 3.

FIG. 7.

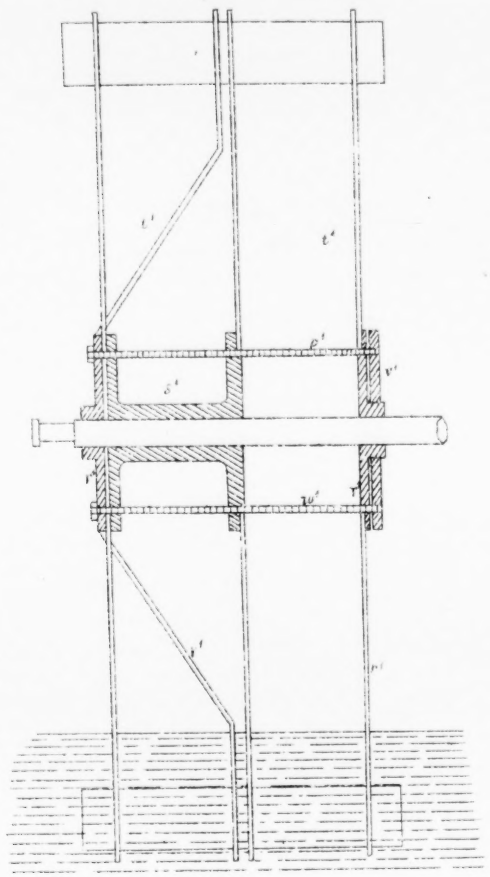


FIG. 8.

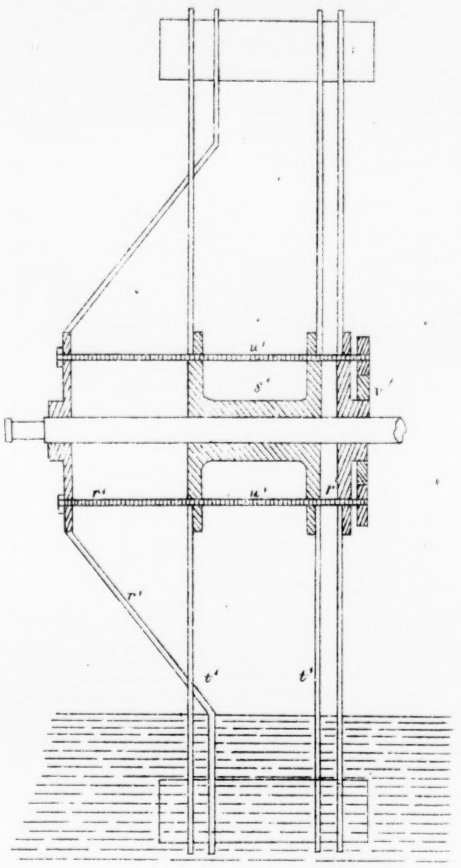
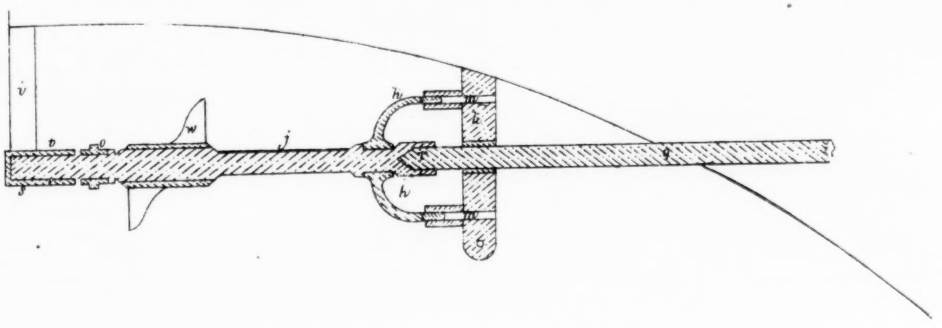


FIGURE. 6.

No 192.
Natl Meter Co.
Bd Water Comrs.
} pp. 263.

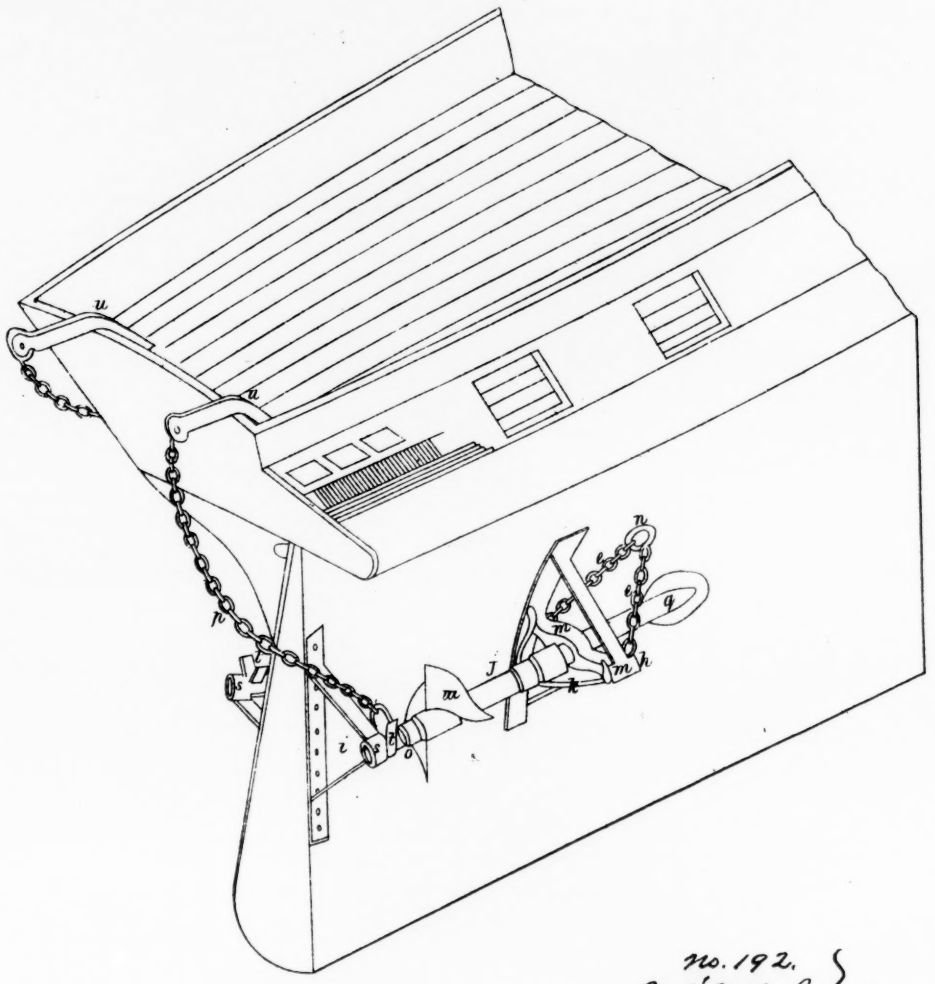


*The enrolled drawing is partly colored.*

A.D. 1843. MAY 25. Nº 9744.
ALLOWAY'S SPECIFICATION.

(3 SHEETS)
SHEET 2

FIGURE. 5.




no. 192.
Natl. Meter Co. } fr. 262.
v.
Bd. Water Comrs

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A.D. 1843. MAY 25. N°9744.
GALLOWAY'S SPECIFICATION.

(3 SHEETS.
SHEET 1.

FIGURE. 1

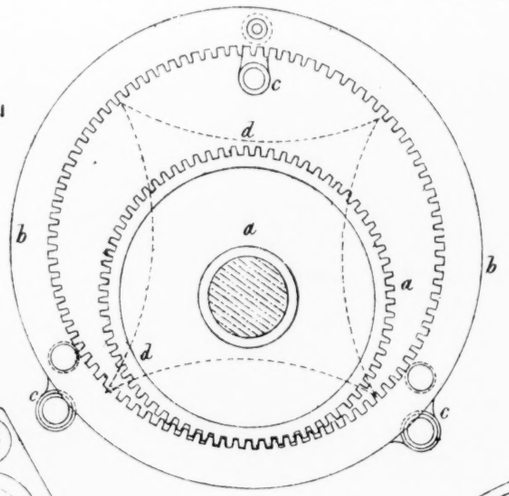



FIGURE. 2.

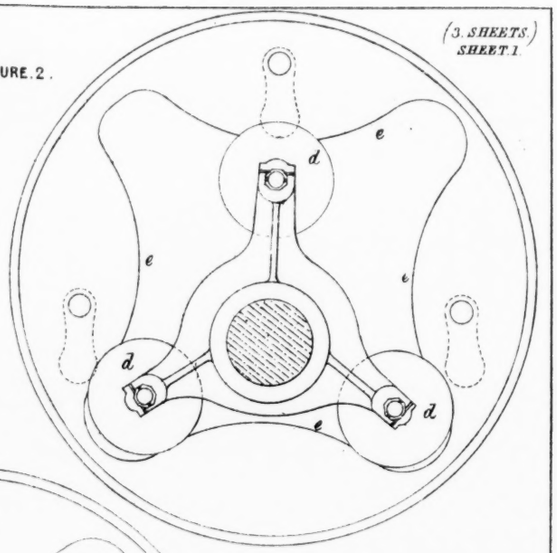
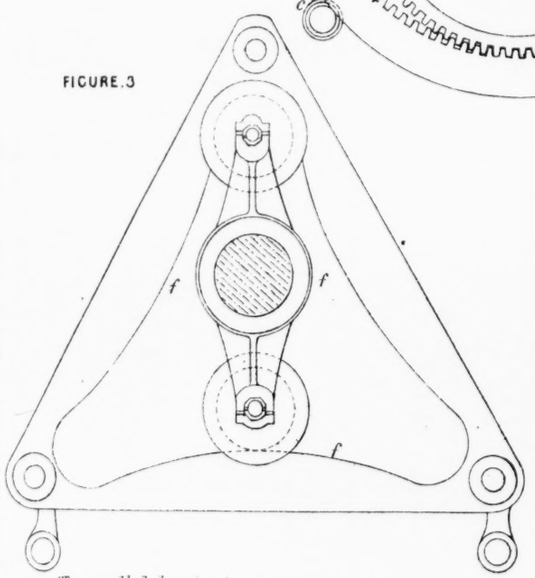



FIGURE. 3



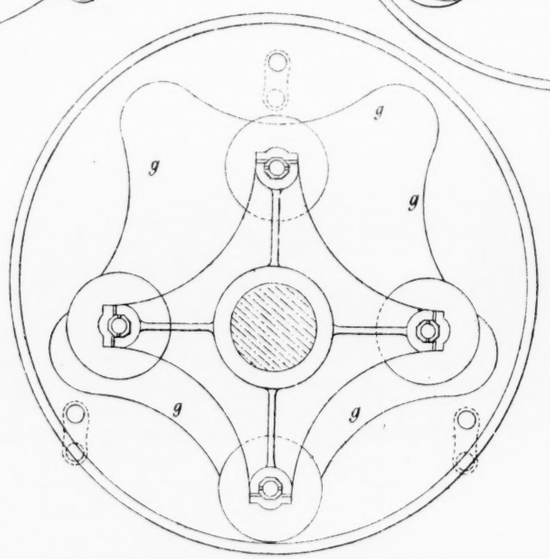




FIGURE. 4.

*The enrolled drawing is colored.*

No. 192
Natl Meter Co.
v.
Bd. Water Comrs
} p. 261.

A.D. 1846. Dec. 14. N° 11,485.
GALLOWAY'S Specification.
(2nd Edition)

(5 SHEETS)
SHEET 1.

FIG. 1.

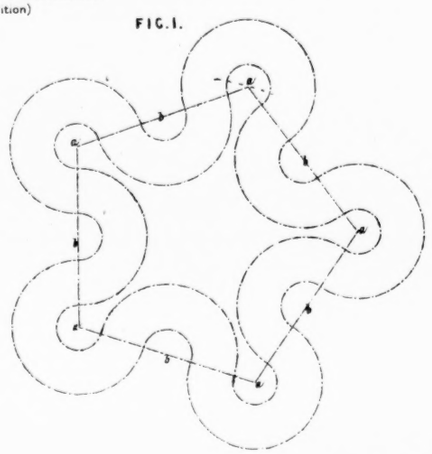
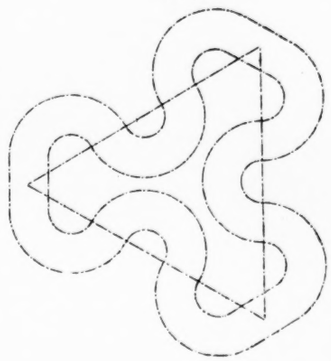


FIG. 3.



No. 192.
Natl. Meter Co.
v.
Bd. Water Comrs.
} p. 270.

FIG. 4.

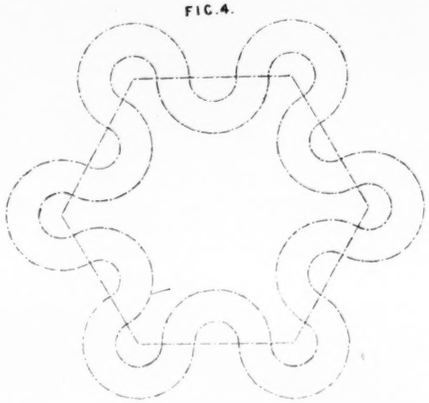
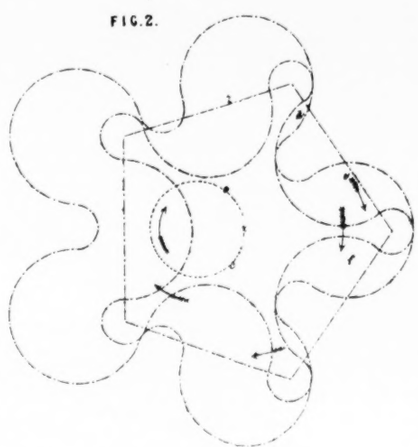


FIG. 2.



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(5 SHEETS)
SHEET 2.

FIG. 5. Bottom

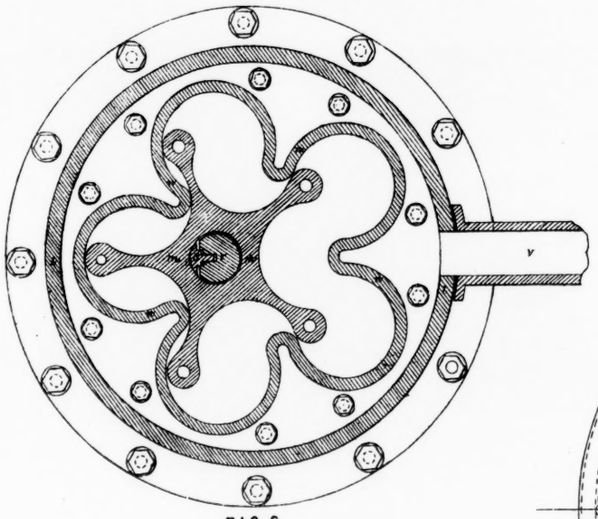

FIG. 6.

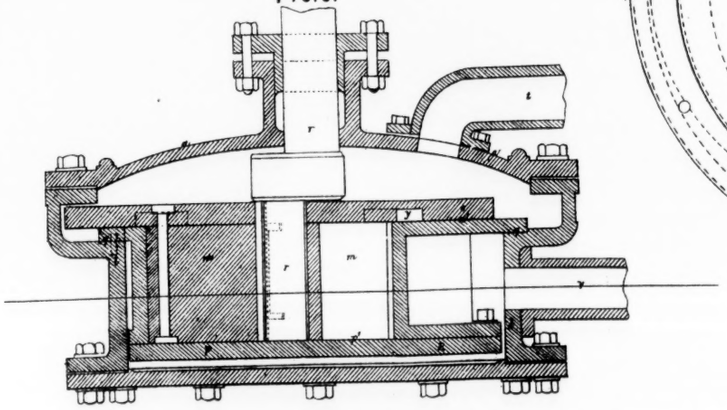

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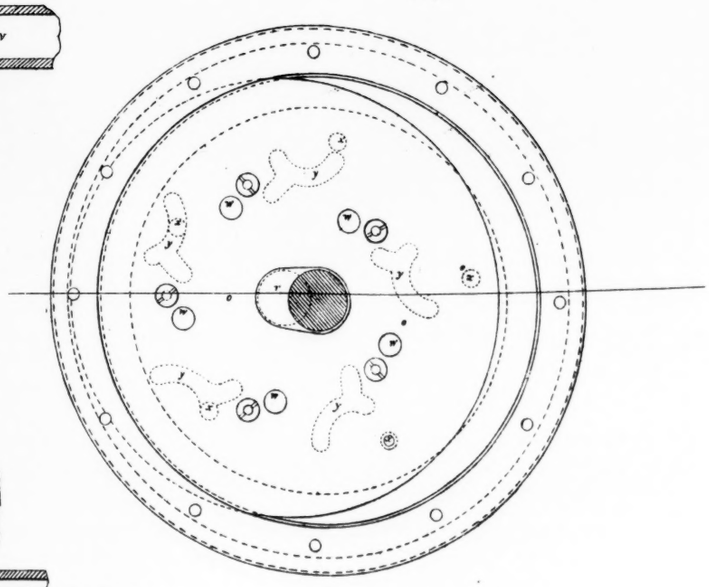
FIG. 7. Top



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(5 SHEETS)
SHEET 3.

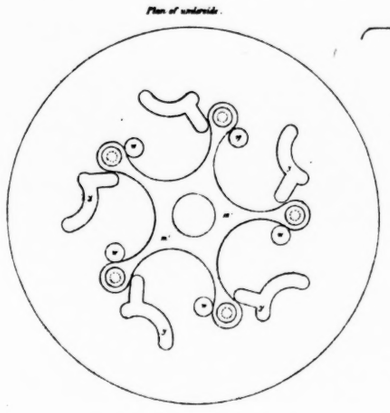
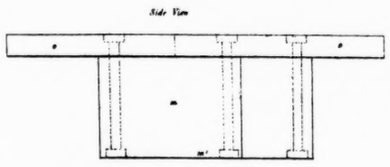



FIG. 8.



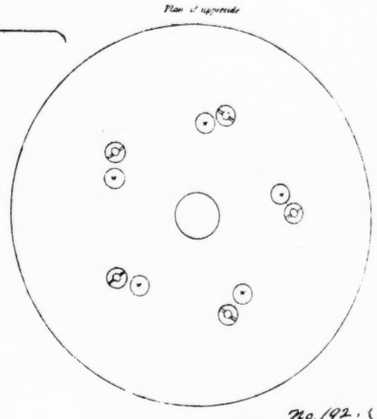
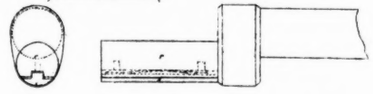




FIG. 10.



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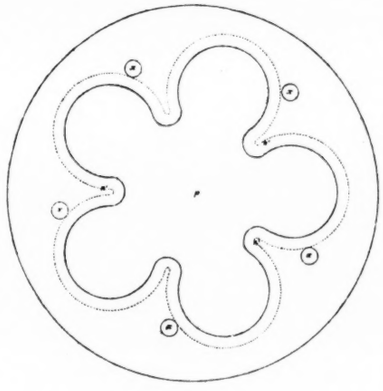
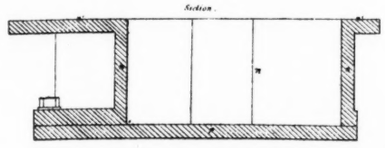
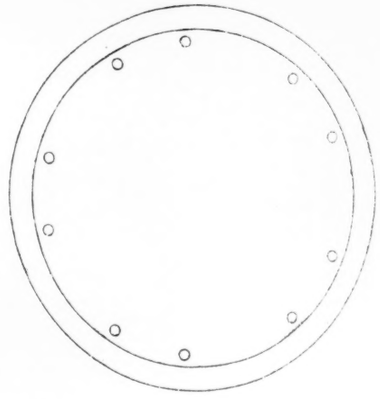



FIG. 9.



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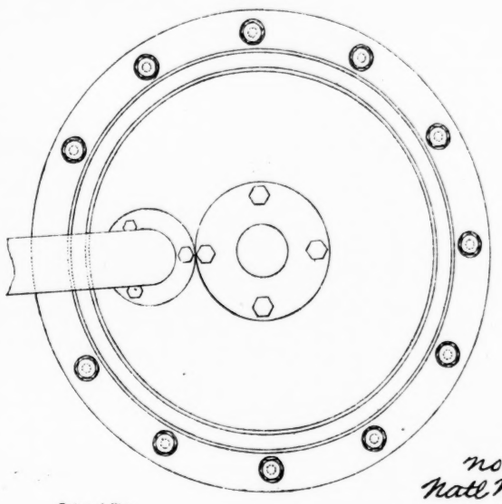
(5 SHEETS)
SHEET 4.

FIG. 11.



External Views

FIG. 13.

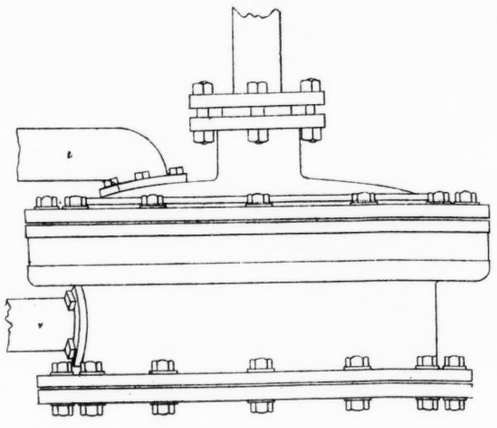
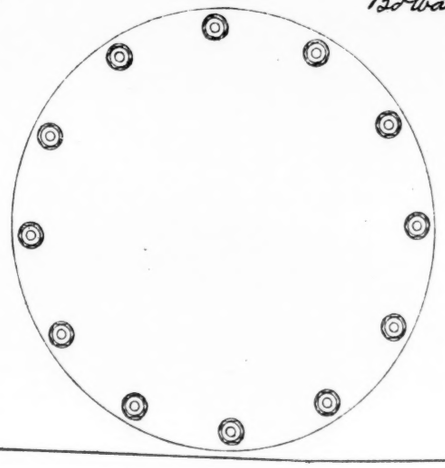


FIG. 12.



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} 1.273.

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(5 SHEETS)
SHEET 5.

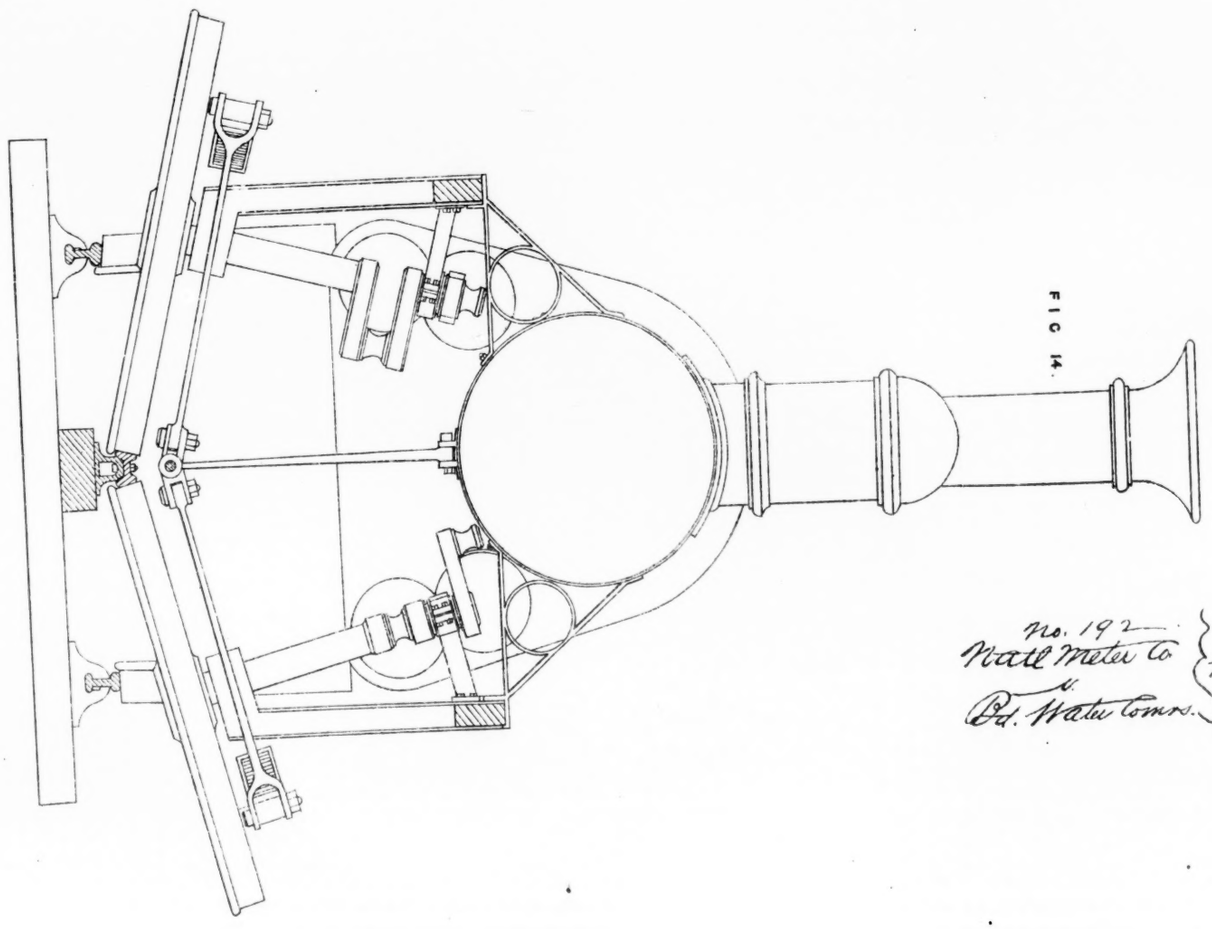

FIG 14.

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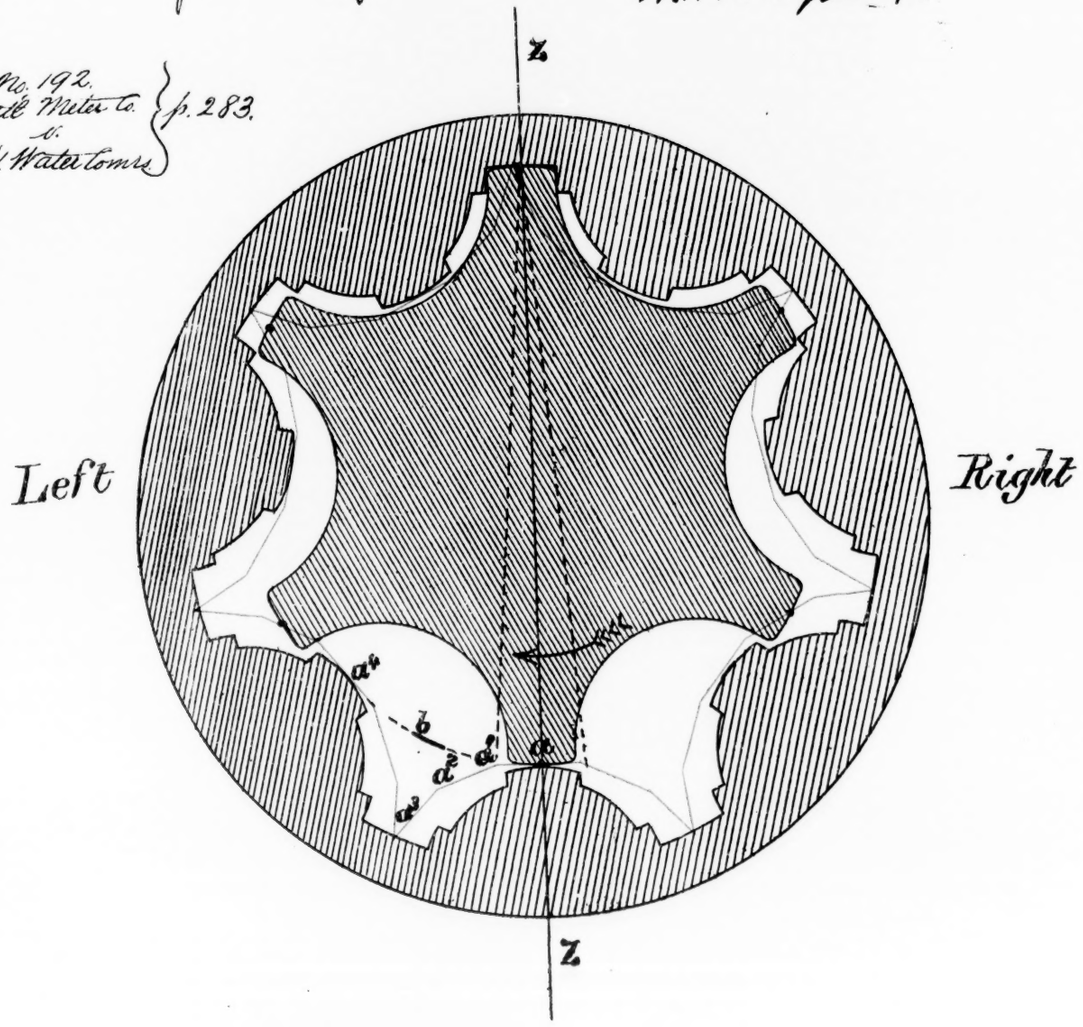
Natl Meter Co
Bd. Water Comrs.
} p. 274.

Defendant's Exhibit Diagram of Motion of Points of Plaintiff's Pistol.

N.H.T. Spec. Ex.

No. 192.
Nash Meter Co. v. Bd Water Comrs } p. 283.



Left

Right

x

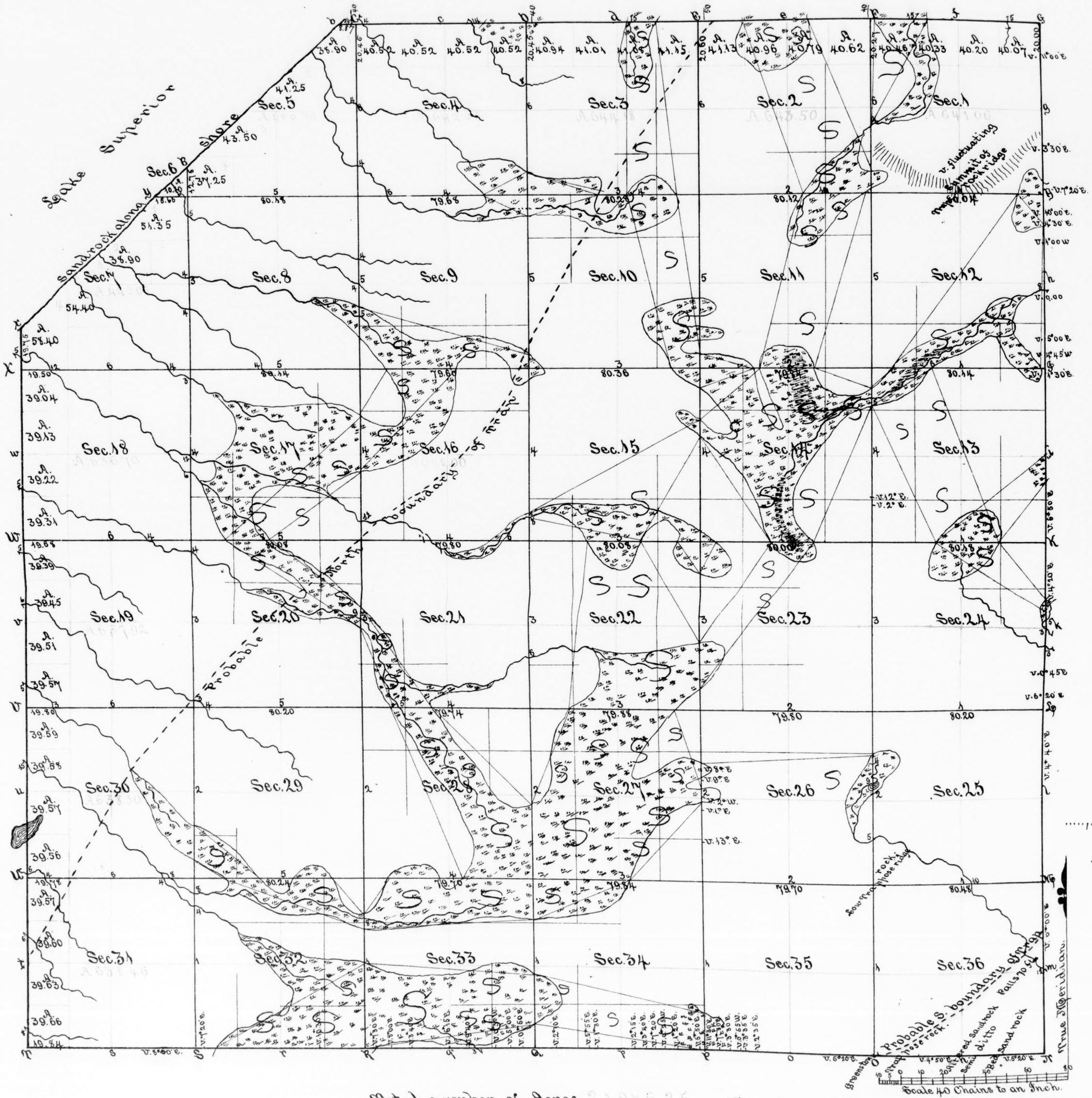
y

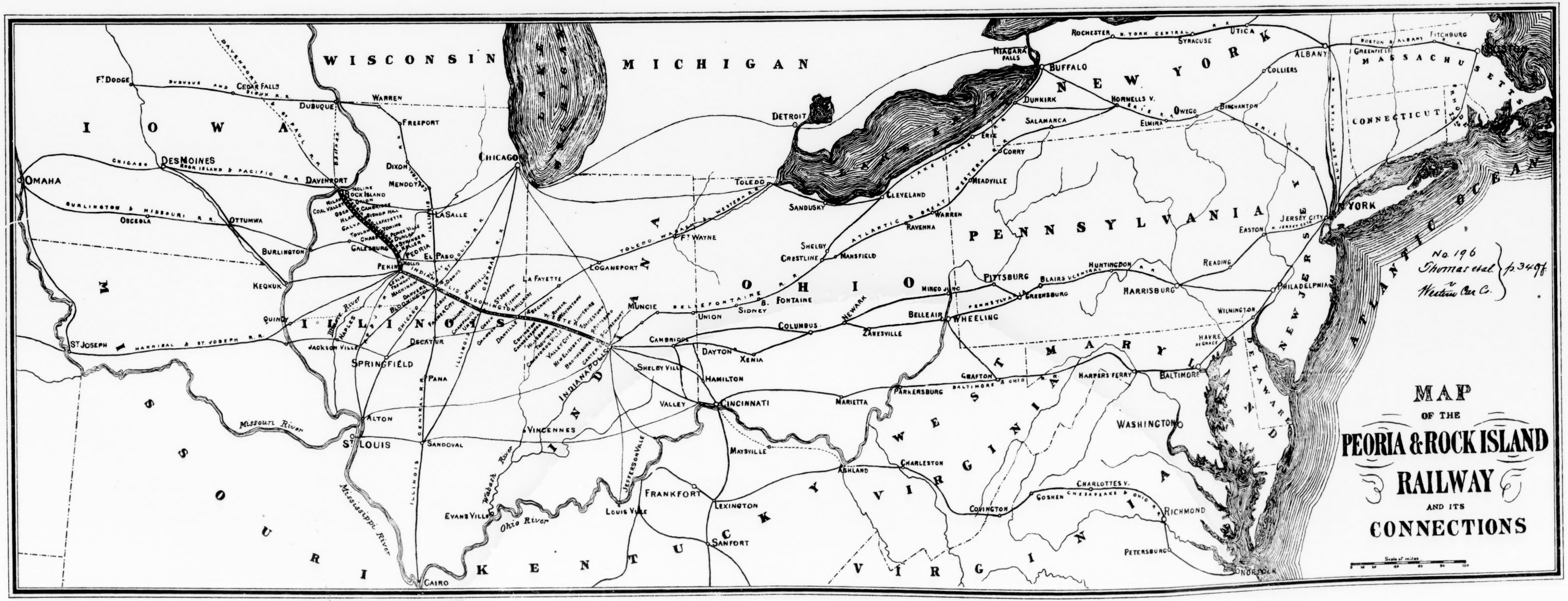
No. 172.
Matt. Martin &
Whitaker Gmn. } p. 296.

Reflected light diagram of Motion.
of Point of Application, & Motion.
M. H. C., Phil. &c.

# Township No. 56 N. Range No. 33 W. Mer. Mich.

| Meanders of Lake Superior | | |
|---|---|---|
| Posts | Courses | Dist. Lks |
| Beginning at post in W. Boundary thence in Sec. 7. | | |
| X | N 47 E | 30.00 |
| | N 50½ E | 25.50 |
| Y | N 46 E | 32.80 |
| Y to B | N 50 E | 20.20 |
| B to D | N 46½ E | 98.20 |


Lake Superior
Sandrock along shore
Probable boundary between 15 & 16
Probable
v. fluctuating
Summit of rock ridge
Sec.1
Sec.2
Sec.3
Sec.4
Sec.5
Sec.6
Sec.7
Sec.8
Sec.9
Sec.10
Sec.11
Sec.12
Sec.13
Sec.14
Sec.15
Sec.16
Sec.17
Sec.18
Sec.19
Sec.20
Sec.21
Sec.22
Sec.23
Sec.24
Sec.25
Sec.26
Sec.27
Sec.28
Sec.29
Sec.30
Sec.31
Sec.32
Sec.33
Sec.34
Sec.35
Sec.36
Probable S. boundary of T.
Rocky ridge
Rocky ridge
Sandrock
Ditto
Sandrock
Sandrock
Ditto
Sand rock
Rocks
Rocks
Rocks

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Thomas et al. p 3498
v.
Western Car C.

# MAP OF THE PEORIA & ROCK ISLAND RAILWAY AND ITS CONNECTIONS